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FIRST REPORT ON THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

Preliminary report

by

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INTRODUCTION. Inclusion of the topic in the Commission's agenda

1. At the Commission's forty-fourth session, in 1992, the Planning Group established a Working Group to consider a limited number of topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission. 1/ They included the law and practice relating to reservations to treaties, which had been suggested as a possible topic by various delegations at the forty-fourth session of the General Assembly. 2/

2. The topic, which had aroused special interest among the members of the Commission, 3/ formed the subject, in accordance with the procedure fixed by the Commission on the recommendation of the Planning Group, 4/ of an explanatory outline indicating (a) the major issues raised by the topic; (b) any applicable treaties, general principles or relevant national legislation or judicial decisions; (c) existing doctrine; and (d) the advantages and disadvantages of preparing a report, a study or a draft convention, if the Commission decided to proceed with the topic. 5/

3. After considering the outline, the above-mentioned Working Group (para. 1 above) recommended the inclusion in the Commission's agenda of the topic entitled "The law and practice relating to reservations to treaties". 6/ For reasons 7/ which will be discussed below, the Commission adopted this recommendation at its forty-fifth session and decided that, subject to approval by the General Assembly, the topic would be included in the agenda. 8/

1/ Yearbook of the International Law Commission, 1992, vol. II, (Part Two), doc. A/47/10, para. 368.

2/ See A/CN.4/L.469, para. 422.

3/ See A/CN.4/L.473/Rev.1, para. 23.

4/ Yearbook ... 1992, op. cit. (footnote 1), para. 369.

5/ A/CN.4/454, pp. 47-71.

6/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), para. 427.

7/ Ibid., paras. 428-430.

8/ Ibid., para. 440.

4. In the debate in the Sixth Committee at the forty-eighth session of the General Assembly, the Commission's decision to include the topic in its agenda was generally endorsed. It was pointed out that the topic had the merit of precision, responding to clear, current needs of the international community and offering the Commission an opportunity to make a direct contribution, on a realistic time-scale, to the formation and development of State practice. 9/

5. Accordingly, in resolution 48/31 of 9 December 1993, the General Assembly endorsed the decision of the International Law Commission to include in its agenda the topic of "The law and practice relating to reservations to treaties", "on the understanding that the final form to be given to the work on [this topic] shall be decided after a preliminary study is presented to the General Assembly". 10/

6. At its forty-sixth session, the Commission appointed the Special Rapporteur for this topic. 11/

7. This preliminary report has no doctrinal pretensions, in that it endeavours to enumerate the main problems raised by the topic, without in any way prejudging the Commission's possible response regarding their substance. On the other hand, in keeping with the General Assembly's wish to have a preliminary study to determine "the final form to be given to the work" on this topic, it has been deemed advisable to submit to the Commission comparatively precise proposals in this regard. Furthermore, as the topic has already been taken up on a number of occasions by the Commission in connection with earlier, more general studies, this report tries to give an overview of that work and to suggest solutions that will not jeopardize earlier advances yet will allow for the codification and progressive development of the law on reservations to treaties. To this end, it will consist of four chapters dealing with:

The Commission's previous work on reservations (chap. I);

The problems left in abeyance (chap. II);

Those raised by the existence of previous instruments which partly regulate the subject-matter and the advantages of which should be maintained (chap. III); and

The possible forms of the results of the Commission's work on the topic (chap. IV).

9/ See A/CN.4/457, para. 433.

10/ A/RES/48/31, para. 7.

11/ Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10), para. 382.

CHAPTER I

THE COMMISSION'S PREVIOUS WORK ON RESERVATIONS AND THE OUTCOME

8. Three topics considered by the Commission since its inception have caused it to study, from different standpoints, the question of reservations to treaties. It has done so in the context of the codification of

The law of treaties;

Succession of States in respect of treaties; and

The question of treaties concluded between States and international organizations or between two or more international organizations.

9. These three topics led to the adoption by diplomatic conferences of three conventions, the Vienna Convention on the Law of Treaties, of 23 May 1969, the Vienna Convention on Succession of States in respect of Treaties, of 22 August 1978, and the Vienna Convention on the Law of Treaties between States and International Organizations or between Two or More International Organizations, of 21 March 1986. All three instruments contain provisions on reservations.

Section 1. The law of treaties

10. The Commission's Special Rapporteurs on the topic of the law of treaties, James L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, engaged in a study of the question of reservations to treaties. All of them laid special emphasis on the problem of the admissibility of reservations.

11. A turning point came, however, in the Commission's position on this point in 1962, following the first report by Sir Humphrey Waldock; 12/ from then on, the Commission gave up the rule of unanimity it had advocated thus far and favoured the flexible system adopted by the International Court of Justice in its advisory opinion of 28 May 1951 on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. 13/

12/ Yearbook ... 1962, vol. II, doc. A/CN.4/144 and Add.1, articles 1 (f) and 17 to 19, pp. 60-68 (Appendix. Historical summary of the question of reservations to multilateral conventions). A "fundamental change in the Commission's approach to reservations" was noted by Sir Ian Sinclair in The Vienna Convention on the Law of Treaties, Manchester W.P., 2nd ed., 1984, p. 58.

13/ I.C.J. Reports 1951, p. 15.

1. The Commission's work from 1950 to 1961

(a) Consideration of the reports by James L. Brierly, 1950-1951

12. In his first report on the law of treaties, submitted to the Commission at its second session, in 1950, the first Special Rapporteur on this topic briefly took up the question of reservations 14/ and was very clearly in favour of the unanimity rule, which was formulated in draft article 10, paragraph 3, proposed to the Commission, in the following terms:

> "The acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation had consented thereto". 15/

13. This principle was adopted with virtually no discussion 16/ by the Commission, which, in its report to the General Assembly, said that:

> "... a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great variety of situations which may arise in the making of multilateral treaties was felt to require further consideration". 17/

14. The problem resurfaced, however, in the same year. Following the debate in the Sixth Committee on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, on 16 November 1950, the General Assembly adopted resolution 478 (V) in which it requested an advisory opinion by the International Court of Justice on the matter and it also invited the Commission:

> "(a) In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the depositary, this report to be considered by the General Assembly at its sixth session;
>
> (b) In connection with this study, to take account of all the views expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee".

14/ Yearbook ... 1950, vol. II, A/CN.4/23, pp. 238-242.

15/ Ibid., p. 240.

16/ Yearbook ... 1950, vol. I (53rd and 78th meetings), pp. 90-97.

17/ Official Records of the General Assembly, Fifth session, Supplement No. 12 (A/1316), para. 164.

15. Further to this request, the Commission had before it, at its third session, a special report by James L. Brierly 18/ and two memoranda, submitted by Gilberto Amado 19/ and Georges Scelle. 20/

16. In his report, the Special Rapporteur argued that:

> "... In approaching this task it would appear that the Commission has to bear in mind two main principles. First there is the desirability of maintaining the integrity of international multilateral conventions. It is to be preferred that some degree of uniformity in the obligations of all parties to a multilateral instrument should be maintained. One of the ways in which international law is developed is by a consistent rule of general application being laid down in multilateral (or what amounts in practice to the same thing a succession of closely similar bilateral) conventions. An example of this may be seen in the rule, now fairly generally accepted, and yet of entirely conventional origin, that consuls de carrière possess certain personal immunities, though under customary international law they originally possessed none. Frequent or numerous reservations by States to multilateral conventions of international concern hinder the development of international law by preventing the growth of a consistent rule of general application.
>
> Secondly, and on the other hand, there is the desirability of the widest possible application of multilateral conventions. It may be assumed, from the very fact that they are multilateral, that the subjects with which they deal are of international concern, i.e., matters which are not only susceptible of international regulation but regarding which it is desirable to reform or amend existing law. If they are to be effective, multilateral conventions must be as widely in force or as generally accepted as possible. An example of this may be seen in the Red Cross Convention of 1949 signed by some 60 States. These are Conventions to which it is clearly desirable to have as many ratifications as possible." 21/

17. The Special Rapporteur concluded that the best solution would be to include express provisions tailored to the different types of treaty, some examples of which he gave in an annex. 22/ He also thought it necessary to

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18/ Yearbook ... 1951, vol. II, doc. A/CN.4/41, pp. 1-17. The report had five annexes (A. Summary of debates in the Sixth Committee of the General Assembly; B. Opinions of writers; C. Examples of clauses in conventions regarding reservations; D. Practice with regard to reservations; E. Draft articles on reservations).

19/ Ibid., doc. A/CN.4/L.9, pp. 17-23.

20/ Ibid., doc. A/CN.4/L.14, pp. 23-26.

21/ Ibid., pp. 3-4, paras. 11 and 12.

22/ Ibid., annex E, pp. 16-17.

envisage the possibility that States would not follow this recommendation and to give guidance to the depositary if the treaty was silent on that point; however, having noted that the opinions of writers were far from unanimous 23/ and the practice far from homogeneous, 24/ he thought that the drafting should wait on the advisory opinion of the International Court of Justice requested by the General Assembly. 25/

18. The Court rendered its opinion on 28 May 1951 26/ and the discussion in the Commission focused basically on this opinion, 27/ which Georges Scelle had vigorously criticized in a memorandum circulated as a working document of the Commission 28/ and which found hardly any support among the other members of the Commission during the discussions.

19. In its report, the Commission noted:

> "... that the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general. It involves a classification of the provisions of a Convention into two categories, those which do and those which do not form part of its object and purpose. It seems reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose". 29/

23/ Ibid., pp. 2-3, paras. 8-9.

24/ Ibid., pp. 3-4, paras. 10-11.

25/ Ibid., p. 4, para. 16.

26/ I.C.J. Reports 1951, p. 15.

27/ Yearbook ... 1951, vol. I (100th to 106th, 125th to 129th and 133rd meetings), pp. 159-213 and 366-394.

28/ Yearbook ... 1951, vol. II, document A/CN.4/L.14, p. 23.

29/ Yearbook ... 1951, vol. II, document A/1858, p. 128, para. 24. It can be noted that in general terms the majority position in the International Law Commission at that time was broadly the same as the position stated in the joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo attached to the Court's advisory opinion of 28 May 1951, I.C.J. Reports 1951, pp. 31-48.

The Commission declared itself "... impressed with the complexity of the task which he would be required to discharge if reserving States can become parties to multilateral conventions despite the objections of some of the parties to their reservations". 30/

20. While noting that "multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a Convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory", 31/ the Commission nevertheless suggested that, "in the absence of contrary provisions in any multilateral convention and of any organizational procedure applicable, the following practice should be adopted with regard to reservations to multilateral conventions, especially those of which the Secretary-General of the United Nations is the depositary:

(1) The depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention.

(2) The depositary of a multilateral convention, in communicating a reservation to a State which is entitled to object, should at the same time request that State to express its attitude towards the reservation within a specified period, and such period may be extended if this is deemed to be necessary. If, within the period so specified or extended, a State fails to make its attitude towards the reservation known to the depositary, or if, without expressing an objection to the reservation, it signs, ratifies, or otherwise accepts the convention within the period, it should be deemed to have consented to the reservation.

(3) The depositary of a multilateral convention should communicate all replies to its communications, in respect of any reservation to the convention, to all States which are or which are entitled to become parties to the convention.

(4) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

(5) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force,

(a) A reservation made by a State at the time of signature should have no effect unless it is repeated or incorporated by reference in the later ratification or acceptance by that State;

30/ Yearbook ... 1951, vol. II, document A/1858, p. 129, para. 25.

31/ Ibid., para. 28.

(b) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention; when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but before the expiration of this period; provided, however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a period of twelve months from the time of the making of its objection, the objecting State has not ratified or otherwise accepted the convention". 32/

21. After lengthy debate, 33/ the Sixth Committee of the General Assembly adopted by a narrow majority 34/ the text which was to become resolution 598 (VI) of 12 January 1952. In this resolution, the General Assembly:

"Requests the Secretary-General:

(a) In relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to the advisory opinion of the Court of 28 May 1951;

(b) In respect of future conventions concluded under the auspices of the United Nations of which he is the depositary:

(i) To continue to act as depositary in connection with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications".

32/ Ibid., para. 34, pp. 130-131.

33/ A/C.6/SR.264 to 278; see also the report of the Sixth Committee (A/2047), pp. 9-12.

34/ By 23 votes to 18, with 7 abstentions.

22. This "non-decision" was poorly received by writers on law, 35/ but it nevertheless constituted the guidance followed by the Secretary-General in his practice as depositary 36/ until 1959, when the problem resurfaced in connection with the declaration made by India on the occasion of the deposit of its instrument of acceptance of the Convention on the Intergovernmental Maritime Consultative Organization. 37/ Once again, the debates were inconclusive and their only concrete consequence was the invitation to the Secretary-General to apply the above-mentioned paragraph 3 (b) of resolution 598 (VI) to all the agreements of which he is the depositary, provided that they were concluded before 1952. 38/

(b) The reports of Sir Hersch Lauterpacht, 1953 and 1954

23. The position taken by the Commission in 1951 was to have a powerful influence on its work on reservations to treaties in subsequent years.

24. In his first report on the law of treaties (1953), Sir Hersch Lauterpacht, who had succeeded James Brierly as Special Rapporteur, took up the problem of reservations once again. He proceeded in a rather unusual manner by proposing a draft article de lege lata, but matching it with four alternative proposals de lege ferenda, which gave the impression that the distinguished Special Rapporteur thought that the existing laws were not

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35/ See in particular C. Fenwick, "When is a Treaty not a Treaty?", American Journal of International Law, 1951, pp. 296-298: "The decision of the General Assembly of the United Nations on 12 January in the matter of reservations to multilateral treaties cannot be said to have clarified the situation. Rather it would seem only to have added to the confusion and left us with a rule which is not a rule at all" (p. 296).

36/ See Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements, prepared by the Treaty Section of the Office of Legal Affairs, United Nations Secretariat, ST/LEG/7, more particularly p. 39, para. 80.

37/ On this problem, see, inter alia, the report of the Secretary-General, Reservations to international conventions: the Convention on the Intergovernmental Maritime Consultative Organization (A/4235); the records of the debates of the Sixth Committee at the fourteenth session of the General Assembly, 614th to 629th meetings, pp. 69-163; and the report of the Secretary-General submitted in accordance with General Assembly resolution 1452 B (XIV) (A/5687). See also Oscar Schachter, "The Question of Treaty Reservations at the 1959 General Assembly", American Journal of International Law, 1960, pp. 372-379.

38/ A/RES/1452 (B) (XIV).

satisfactory and that he hoped to have them modified by persuading the Commission to engage in the progressive development of international law. 39/

25. Draft article 9 stated the principle of unanimity very clearly:

> "A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty". 40/

According to the Special Rapporteur, "article 9 as here drafted must be regarded as probably still representing the existing law". 41/ "However", he added, "although nothing decisive has occurred to dislodge the principle of unanimous consent as a rule of existing international law, the Commission, for reasons stated in the comment which follows, is not now of the view 42/ that it constitutes a satisfactory rule and that it can - or ought to - be maintained". 43/

26. From that time on, the three alternative proposals weakened the rigour of the principle. The "principal considerations underlying the alternative drafts" were presented by Lauterpacht in the following way:

> "A. It is desirable to recognize the right of States to append reservations to a treaty and become at the same time parties to it provided these reservations are not of such a nature to meet with disapproval on the part of a substantial number of the States which finally accept the obligations of the treaty;
>
> B. It is not feasible or consistent with principle to recognize an unlimited right of any State to become a party to a treaty while appending reservations however sweeping, arbitrary, or destructive of the reasonably conceived purpose of the treaty and of the legitimate interests and expectations of the other parties;

39/ Yearbook ... 1953, vol. II, document A/CN.4/63, pp. 91-92 and 123. It must be pointed out that the report is presented as a draft report of the Commission; however, since the Commission did not state a view, the report reflects the views of the Special Rapporteur alone.

40/ Ibid., p. 91.

41/ Ibid., p. 123.

42/ Op. cit., footnote 39, p. 124.

43/ See footnote 39 above.

C. The requirement of unanimous consent of all parties to the treaty as a condition of participation in the treaty of a State appending reservations is contrary to the necessities and flexibility of international intercourse". 44/

27. There is no need to go into the details of each of these alternatives - some of which proposed bold solutions. 45/ As José María Ruda pointed out, "[t]he main characteristic of these alternatives is that they were offered as new proposals, as a compromise between the unanimity rule and the principle of a sovereign right to formulate reservations. They had the flexibility of the Pan-American rules, but they provided more guarantees against the abuse on making reservations (...). The impact of the new realities of international life and the Advisory Opinion of the International Court of Justice had begun to shake the basis of a well-established rule of international law". 46/

28. Apart from one small change to the draft article de lege lata, 47/ Lauterpacht repeated his 1953 proposals in 1954. 48/ In his second report on the law of treaties, he argued forcefully in favour of a progressive development of the existing rules and commented, not without malice:

"It is a matter for reflection that while the International Court of Justice, whose function is to apply existing law, in its advisory opinion on the question of Reservations to the Convention on Genocide, devoted itself mainly to the development of the law in this sphere by laying down the novel principle of compatibility of reservations with the purpose of the treaty, the International Law Commission, whose task is both to codify and develop international law, limited itself substantially to a statement of existing law". 49/

29. Moreover, the Special Rapporteur drew attention to the current discussions about reservations to the future International Covenant on Human Rights and, in particular, to the British proposal which drew

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44/ Ibid., p. 125.

45/ Such as, for example, the solution of entrusting the Chamber of Summary Procedure of the International Court of Justice with responsibility for ruling on the admissibility of reservations (alternative D) (ibid., p. 134).

46/ J.M. Ruda, "Reservations to Treaties", Recueil des cours de l'Académie de droit international, 1975-III, vol. 146, p. 158.

47/ The Special Rapporteur proposed that the words "Unless otherwise provided by the treaty," should precede the text quoted in para. 25 above.

48/ Yearbook ... 1954, vol. II, document A/CN.4/87, pp. 131-133.

49/ Ibid., p. 131.

extensively on the deliberations of Sir Gerald Fitzmaurice - who would succeed Lauterpacht the next year following his election to the International Court of Justice - in an article published in 1953. 50/ 51/

(c) The first report of Sir Gerald Fitzmaurice (1956)

30. Since, for lack of time, the reports of Sir Hersch Lauterpacht were not discussed by the Commission, the new Special Rapporteur in his first report, drafted in 1956, took up once again the question of reservations, which were the subject of articles 37 to 40 of the "Code" which he proposed should be adopted. 52/

31. Fitzmaurice's proposals, which drew extensively on the article cited above (para. 29), to which it referred explicitly, 53/ did not depart very far in their general spirit from those of his predecessor. Like Lauterpacht, Fitzmaurice started from the principle of unanimity, which he applied strictly to bilateral and "plurilateral" treaties, 54/ but he too tried to weaken the rigour of the principle by taking a relatively timid line in that respect, for the system which he proposed rested on an entirely consensual basis: in cases where the treaty is silent, a reservation has effect only if

> the intention to make it was stated during the negotiation of the treaty without meeting with any objection; or
>
> the States concerned, 55/ to which the reservation must be communicated, do not raise any objection; but
>
> "If a reservation meets with objection, (...) the reserving State (...) cannot become (...) a party (...) unless the reservation is withdrawn". 56/

50/ Ibid., pp. 131-133.

51/ G.G. Fitzmaurice, "Reservations to Multilateral Conventions", International and Comparative Law Quarterly, 1953, pp. 1-26.

52/ G.G. Fitzmaurice, Report on the law of treaties, Yearbook ... 1956, vol. II, doc. A/CN.4/101, pp. 115-116 and 126-127.

53/ Ibid., pp. 126-130.

54/ Art. 38 (ibid., pp. 115 and 127). Fitzmaurice defines plurilateral treaties as treaties "made between a limited number of States for purposes specially interesting those States".

55/ This notion was subjected to quite complicated tinkering.

56/ Art. 39, para. 3, op. cit. (footnote 52 above), pp. 115 and 127.

32. Sir Gerald Fitzmaurice also tried to provide a rigorous definition of the notion of reservation:

> "Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to be regarded as such, and the term reservation herein is to be understood as limited in that sense". 57/

33. The provisions concerning reservations proposed in Fitzmaurice's first report were not considered by the Commission and the Special Rapporteur did not have an opportunity to return to them subsequently before his election to the International Court of Justice in 1961.

2. The work of the Commission from 1962 to 1965

34. The first report of Sir Gerald Fitzmaurice constitutes the swansong of the principle of unanimity, which was abandoned by the Commission following the reports of his successor as Special Rapporteur, Sir Humphrey Waldock.

(a) Consideration of the first report by Sir Humphrey Waldock (1962)

35. The first report by Sir Humphrey Waldock deals with the conclusion, entry into force and registration of treaties and includes copious developments with respect to the commentaries to the three draft articles relating to reservations. 58/ In addition, in draft article 1, the Special Rapporteur proposed a definition of the word "reservation", which he characterized - in contrast to "an explanatory statement or statement of intention or of understanding" - by the fact that it "will vary the legal effect of the treaty in its application between [the State making the reservation] and the other party or parties to the treaty". 59/

36. Taking up the distinction, already drawn by Sir Gerald Fitzmaurice 60/, between bilateral and plurilateral treaties 61/ on the one hand and multilateral treaties on the other, the Special Rapporteur

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57/ Ibid., p. 115, art. 37, para. 1; see also art. 13, para. 1.

58/ Arts. 17 ("Power to formulate and withdraw reservations"), 18 ("Consent to reservations and its effects") and 19 ("Objection to reservations and its effects"); Yearbook ... 1962, vol. II, doc. A/CN.4/144, pp. 60-68. See also the "Historical summary of the question of reservations to multilateral conventions", reproduced as an appendix (ibid.), pp. 73-80.

59/ Ibid., p. 31.

60/ See footnotes 31 and 54 above.

61/ Which, according to the Special Rapporteur, pose no particular problems: reservations to those categories of agreements must, in principle, be accepted by the other party or parties.

focuses his attention on reservations to the latter category of instruments and comes out firmly in favour of a "flexible" system, adducing, inter alia, the following arguments:

(i) The proposals formulated by the Commission in 1951, which differed from the opinion of the Court delivered that same year 62/, did not commend themselves to a majority of States in the General Assembly 63/;

(ii) "The international community itself has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable" 64/;

(iii) In implementation of General Assembly resolution 593 (VI) 65/, "the system which has been in operation de facto for all new multilateral treaties of which the Secretary-General is the depositary has approximated to the 'flexible' system advocated by the larger of the two main groups of States in the General Assembly in 1951" 66/;

(iv) The "essential interests of each individual State" are safeguarded by a flexible system, as, through an objection to a reservation, the objecting State may prevent the treaty from entering into force between itself and the reserving State by the operation of the provision to which the reservation applies 67/;

(v) Such a system should have no sensible effect on the drafting of multilateral treaties, the text of which would, in any case, require the approval of a two-thirds majority of the negotiating States 68/;

(vi) "The integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by

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62/ See footnote 19 above.

63/ Op. cit. (footnote 58), p. 63.

64/ Ibid.

65/ See footnote 21 above.

66/ Op. cit. (footnote 58), p. 63.

67/ Ibid., p. 64.

68/ Ibid., p. 64.

a number of States", if only because of the threat of objections by the other States 69/;

(vii) Furthermore, "the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved [...] may be the one most suited to the immediate needs of the international community" 70/.

37. Taking those premises as his starting point, Sir Humphrey Waldock proposed a system which differed in many respects from those envisaged by his predecessors.

38. He started from the principle that, unless expressly or implicitly forbidden by the treaty itself,

> "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate 71/ a reservation ..." 72/, provided that it "shall have regard to the compatibility of the reservation with the object and purpose of the treaty". 73/

39. The Special Rapporteur thus referred, for the first time in the Commission, to the criterion adopted by the International Court of Justice in 1951 and rejected by the International Law Commission that same year. However, "although also of the opinion that there is value in the Court's principle as a general concept," Sir Humphrey Waldock expressed his doubts as to that highly subjective concept and refused to use it "as a criterion of a reserving State's status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States." 74/ Consequently, draft article 18 provided:

69/ Ibid., pp. 64 and 65.

70/ Ibid., p. 65.

71/ Waldock rightly points out that "there is an inherent ambiguity in saying [...] that a State may 'make' a reservation; for the very question at issue is whether a reservation formulated by one State can be held to have been effectively 'made' unless and until it has been assented to by the other interested States." (ibid., p. 62).

72/ Art. 17, para. 1 (ibid., p. 60).

73/ Art. 17, para. 2 (a) (ibid., p. 60).

74/ Ibid., p. 66 (italics in the text).

"1. A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent ...", 75/

a presumption that could result from the silence of States which are, or are entitled to become, parties to the treaty, for a period of 12 months. 76/

40. The most original feature of Sir Humphrey Waldock's draft was not, however, that presumption. 77/ Rather, it concerned the effects resulting from the acceptance, express or implied, of a reservation, since, according to draft article 18, paragraph 4 (b) (ii):

"The consent, express or implied, of any other State which is a party or a presumptive party to a multilateral treaty shall suffice, as between that State and the reserving State, to establish the admissibility of a reservation not specifically authorized by the treaty, and shall at once constitute the reserving State a party to the treaty with respect to that State". 78/

41. Conversely, if an objection to a reservation causes a bilateral treaty to "fall to the ground" and excludes the participation of the State which has formulated the reservation to a bilateral treaty:

"In the case of a multilateral treaty, the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States, but shall not preclude its entry into force as between the reserving State and any other State which does not object to the reservation". 79/

42. The debate in the Commission revealed profound divisions among its members; 80/ nevertheless, a majority concluded that:

"In the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State

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75/ Ibid., p. 61.

76/ Art. 18, para. 3 (b) (ibid., p. 61).

77/ The two previous Special Rapporteurs had proposed shorter periods, of three months.

78/ Op. cit. (see footnote 58), p. 61; this rule was to be applicable only in the absence of contrary rules provided in the treaty itself and, for the constituent instruments of international organizations, subject to the consent of the competent organ.

79/ Art. 19, para. 4 (ibid., p. 62).

80/ See Yearbook ... 1962, vol. I, 651st to 656th, 663rd to 664th and 667th and 668th meetings, pp. 139-175, 221-234, 252-253, 257-258.

individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a 'collegiate' system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned". 81/

43. As to the detail, however, the Special Rapporteur's proposals have been substantially transformed by the Commission:

(i) The distinction between "plurilateral" treaties, multilateral treaties not of a general character and general multilateral treaties has been abandoned. "The rules proposed by the Commission therefore cover all multilateral treaties, except those concluded between a small number of States, for which the unanimity rule is retained" 82/;

(ii) The draft articles adopted by the Commission no longer cover reservations to a bilateral treaty, which "presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty" 83/;

(iii) Some minor drafting changes, generally with a view to simplification, were made to the draft articles proposed by Waldock;

(iv) Which, instead of three, became five, devoted respectively to "formulation of reservations" (art. 18), "acceptance of and objection to reservations" (art. 19), "the effect of reservations" (art. 20), 84/ "the application of reservations" (art. 21) 85/ and "the withdrawal of reservations" (art. 22). 86/

44. However, the main change introduced by the Commission to the system proposed by the Special Rapporteur is the link established by article 20,

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81/ Yearbook ... 1962, vol. II, doc. A/5209, p. 180.

82/ Ibid., p. 180.

83/ Ibid., p. 177.

84/ Ibid., pp. 175-176.

85/ Ibid., p. 181.

86/ Ibid., p. 181.

paragraph 2, between the principle of compatibility with the object and purpose of the treaty - thereby elevated to the rank of a true "criterion" - 87/ and the effect of objections to reservations, since

> "(b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State".

45. The purely consensual system adopted by Sir Humphrey Waldock was thus altered by the inclusion of an eminently subjective criterion, without the respective roles of the one and the other being clearly defined and with the Commission itself acknowledging, in its commentary to that provision, that "the criterion of 'compatibility with the object and purpose of the treaty' [...] is to some extent a matter of subjective appreciation"; and that "this necessarily means that there may be divergent interpretations of the compatibility of a particular reservation with the object and purpose of a given treaty". 88/ This ambiguity, which has never been completely removed, gave rise to many discussions subsequently and to a number of difficulties, but it no doubt enabled the system to be adopted and is even perhaps the explanation for its relative success.

46. Despite this ambiguity - or perhaps, because of it! - the Commission's draft was favourably received during the debates in the General Assembly. 89/ Bolstered by that broad majority support, the "flexible" system had now supplanted the "traditional" system; it would no longer be called into question in the future.

(b) The adoption of the draft articles on the law of treaties (1965-1966)

47. In 1965, Sir Humphrey Waldock submitted to the Commission his fourth report on the law of treaties, in which he proposed a revision of the draft articles to take account of the comments of Governments. In addition to those comments, the Commission also had before it the following documents, prepared by the Secretariat:

> "Resolutions of the General Assembly concerning the law of treaties", 90/

87/ See footnote 39 above.

88/ Op. cit. (footnote 81), p. 181.

89/ General Assembly, Seventeenth session, Sixth Committee, 736th-744th meetings, and ibid., Annexes, agenda item 76, doc. A/5287, para. 24.

90/ Yearbook ... 1963, vol. II, doc. A/CN.4/154, pp. 18-28, paras. 106-124.

"Depositary practice in relation to reservations". 91/

48. The fourth report of the Special Rapporteur dealt, inter alia, with the provisions relating to reservations, 92/ to which it proposed certain amendments, in line with the wishes of some States.

49. The Special Rapporteur was receptive to a criticism by the Danish Government 93/ about the general structure of the draft articles relating to reservations, which it regarded as unnecessarily complicated and liable to cause confusion, particularly inasmuch as it might give the impression that the procedure for implied acceptance of reservations 94/ might be applicable to reservations prohibited by the treaty. Consequently, the title 95/ and the contents of the first three articles were changed so as clearly to distinguish cases of "treaties permitting or prohibiting reservations" (art. 18) from those "silent concerning reservations" (art. 19), with article 20 on the "procedure regarding reservations" and the titles of articles 21 ("The application of reservations") and 22 ("The withdrawal of reservations") remaining unchanged.

50. Albeit with some nuances, it is certain that, on the whole, Governments approved of the "flexible" system adopted by the Commission in 1962 96/ and Sir Humphrey Waldock was certainly justified in considering that:

> "Although they criticize certain aspects of the Commission's proposals, the comments of Governments, taken as a whole, appear [...] to endorse the Commission's decision to try to work out a solution of the problem of reservations to multilateral treaties on the basis of the flexible system followed in the existing texts of articles 18-20". 97/

51. It is no less clear that Governments showed themselves perplexed about the exact role of the criterion of compatibility of the reservation with the

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91/ Yearbook ... 1965, vol. II, doc. A/5687, pp. 74-107 (Annexes: I. Questionnaire addressed to depositaries; II. Examples of reservation clauses appearing in conventions concluded under the auspices of the United Nations; III. General Assembly resolutions governing the practice of the Secretary-General in respect of reservations).

92/ Yearbook ... 1965, vol. II, doc. A/CN.4/177 and Add.1 and 2, p. 15 (art. 1 (f)) and pp. 45-56 (arts. 18-22).

93/ Ibid., p. 46.

94/ See footnote 39 above.

95/ See footnote 43 above.

96/ See footnotes 40 and 41 above.

97/ Op. cit. (footnote 92), p. 50.

purpose and object of the treaty in the globally consensual mechanism retained by the Commission. 98/ Their comments were, however, the result of greatly differing considerations which often led them to opposite conclusions:

> In the view of some, this criterion might lead to an abusive restriction of the right to formulate reservations; 99/
>
> Others considered it too vague 100/ or unnecessary; 101/
>
> Others again considered that it should be strengthened and, if possible, "objectivized". 102/

52. Faced with these differences of opinion, the Special Rapporteur firmly maintained the principle adopted by the Commission, pointing out, in the first place, that a reservation incompatible with the purpose and object of the treaty would be contrary to the principle of good faith and, in the second place, that it seemed very unlikely that that criterion "would exercise a material influence in inhibiting participation in multilateral treaties". 103/ He therefore proposed a new wording for draft article 19, paragraph 1, which merely positively reaffirmed the principle stated in 1962:

> "Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty ...". 104/

However, this express limitation on the right to formulate reservations is not expressly referred to in draft article 19, paragraph 4, which deals with the effect of acceptance or objection and, according to Waldock, this means that "incompatible" reservations are prohibited, whereas "compatible" reservations may be the subject of objections. 105/

98/ See footnote 45 above.

99/ See op. cit. (footnote 52), p. 47 (Poland).

100/ Ibid., p. 46 (Denmark).

101/ Ibid., p. 48 (Argentina).

102/ Ibid., p. 46 (Canada), p. 47 (United Kingdom) and pp. 47-48 (United States of America).

103/ Ibid., p. 51.

104/ Ibid., pp. 50 and 54.

105/ This emerges in particular from para. 10 of the commentary to articles 18-20 (op. cit. (footnote 92), p. 52), the meaning of which is not, however, absolutely clear or was not elucidated during the debates.

53. The new draft article proposed by the Special Rapporteur thus read:

> "(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;
>
> (b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting State and the reserving State." 106/

54. The other changes proposed by the Special Rapporteur were relatively minor:

> Unanimous acceptance by the parties is required "When it appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be considered an essential condition of the treaty"; 107/
>
> The obligation to raise an objection to a reservation within a period of 12 months is limited to States parties only; 108/ and
>
> Several procedural or drafting simplifications were introduced.

55. However, Sir Humphrey Waldock rejected the suggestion by the Japanese 109/ and United Kingdom 110/ Governments that he should include a provision clearly drawing a distinction between a reservation and an interpretive declaration, stating that declarations "are not reservations and appear to concern the interpretation rather than the conclusion of treaties". 111/ Although some members raised that point again during the Commission's discussions, 112/ he subsequently maintained his position. 113/ In its commentary to the final version of article 2, however, the Commission explained that a "declaration" made by a State when it

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106/ Op. cit. (footnote 92), pp. 50 and 54.

107/ Art. 19, para. 2 (ibid., pp. 50 and 54).

108/ Art. 20, para. 4 (ibid., pp. 53 and 54).

109/ Ibid., p. 49, and A/CN.4/175.

110/ Ibid., p. 49.

111/ Ibid., p. 49.

112/ See, for example, the statements by Verdross and Ago in Yearbook ... 1965, vol. I, 797th and 798th meetings, p. 151 and p. 162, respectively.

113/ Ibid., p. 165.

signed, ratified, accepted, approved or acceded to a treaty "may amount to a reservation, according as it does or it does not vary or exclude the application of the terms of the treaty as adopted". 114/

56. Subject to last-minute drafting amendments in 1966, 115/ the final text of the articles on reservations 116/ was adopted in 1965, 117/ although the final commentary was published only the following year with the draft as a whole. 118/ The Commission did not discuss the structure of the draft again and the "flexible" system adopted in 1962 was not questioned. Following lengthy and difficult discussions, however, major changes were made to the new proposals by the Special Rapporteur.

57. The most important changes are the following:

(i) Article 16, now restricted to the "formulation of reservations", makes compatibility with the object and purpose of the treaty one of the general conditions to which the right to formulate a reservation is subject; 119/ the principle was applied by the International Court of Justice in its 1951 advisory opinion in the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide case. 120/ The above-mentioned ambiguity 121/ is far from having been dispelled, however, since the Commission stated in its commentary that:

> "The admissibility or otherwise of a reservation under paragraph (c) [which establishes the requirement of compatibility], on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this

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114/ Yearbook ... 1966, vol. II, doc. A/6309/Rev.1, pp. 189-190.

115/ Yearbook ... 1966, vol. I (Part Two), 887th and 893rd meetings, p. 292 and p. 326.

116/ These articles were renumbered as follows: article 16 ("Formulation of reservations"); article 17 ("Acceptance of and objection to reservations"); article 18 ("Procedure regarding reservations"); article 19 ("Legal effects of reservations"); article 20 ("Withdrawal of reservations").

117/ Yearbook ... 1965, vol. I, 796th to 813th, 814th and 816th meetings, pp. 143-178, 263-273 and 283-285.

118/ Op. cit. (footnote 114), pp. 189-190 and 202-209.

119/ Ibid., p. 202.

120/ See footnote 13 above.

121/ See footnote 45 above.

paragraph has, therefore, to be read in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations". 122/

(ii) In draft article 17, paragraph 2, 123/ the words "limited number of the parties to the treaty" are replaced by the words "limited number of the negotiating States". There is thus no longer any reference to "the circumstances of the conclusion of the treaty" and, in particular, the concept of the "nature of the treaty" is replaced by that of its object and purpose. 124/

(iii) A clarification is added in article 17, paragraph 4 (b), which provides that:

> "An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State". 125/

This opened the door to the possibility that the reserving State and the objecting State might nevertheless be bound by the treaty. By the same token, the Commission admitted that an objection was not necessarily based on the incompatibility of a reservation with the object and purpose of the treaty. 126/

3. The Vienna Conference on the Law of Treaties (1968-1969) and the question of reservations

58. The Vienna Convention on the Law of Treaties was convened by General Assembly resolution 2287 (XXII) of 6 December 1967 and held its two sessions in Vienna from 26 March to 24 May 1968 and from 6 April to 22 May 1969. Although the provisions ultimately adopted were largely based on the Commission's proposals, it is no exaggeration to say that,

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122/ Op. cit., footnote 114, p. 207. See (iii) below.

123/ Corresponding to article 19, paragraph 2, of the Special Rapporteur's draft (see footnote 54 above (emphasis added)).

124/ Op. cit., footnote 14, p. 202 (emphasis added).

125/ Ibid., p. 202 (emphasis added). The Special Rapporteur himself suggested this addition, op. cit. (footnote 92), p. 55.

126/ "Objections are sometimes made to reservations for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States" (ibid., p. 207).

together with the "all States" clause and jus cogens, the question of reservations gave rise to one of the main discussions which divided the participating States and on which the Conference spent the most time. 127/

59. Although some States expressed a preference during the Conference not for the traditional system, but for closer checking of reservations, and even submitted amendments along those lines, the text finally adopted embodies the "flexible" system and even makes it more flexible on some important points. Thus:

The Conference adopted a Polish amendment 128/ to article 19 (b) 129/ designed to authorize additional reservations, as appropriate to a treaty listing certain implied reservations if the list is not exhaustive; article 19 (c) was also amended accordingly;

And, in particular, on the basis of a Soviet amendment, 130/ the presumption established by article 17, paragraph 4 (b), of the International Law Commission's draft 131/ was reversed in the corresponding article 132/ of the Convention, which adopts the principle that an objection to a reservation does not preclude the entry into force of the treaty as between the reserving and objecting States unless the latter has "clearly expressed" the contrary intention; article 21, paragraph 3, was also amended accordingly. Strangely enough,

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127/ See United Nations Conference on the Law of Treaties, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, first session, 26 March-24 May 1968, pp. 106-138; second session, pp. 1-44; 179-180; and 220-221. See also Documents of the Conference, Reports of the Committee of the Whole, doc. A/CONF.39/14, pp. 111-113 and 132-142, and doc. A/CONF.39/15, pp. 239-240; and the proposals and amendments submitted to the Plenary Conference, pp. 265-267. See also the working paper prepared by the Secretariat, "Analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties" (A/CONF.39/5 (vol. I)), pp. 158-172.

128/ See Reports of the Committee of the Whole, op. cit. (footnote 127), doc. A/CONF.39/C.1/L.136, p. 134.

129/ Corresponding to article 16 (b) of the Commission's draft.

130/ See Documents of the Conference, op. cit. (footnote 127), doc. A/CONF.39/L.3, pp. 265-266. Later amendments along the same lines (by Syria (A/CONF.39/C.1/L.97), Czechoslovakia (A/CONF.39/C.1/L.85) and the USSR (A/CONF.39/C.1/L.115)) had earlier been rejected by the Committee of the Whole.

131/ See para. 57 (iii) above.

132/ Art. 20, para. 4 (b).

the Expert Consultant, Sir Humphrey Waldock, did not object to that change, considering that "the problem was merely that of formulating a rule one way or the other". 133/

60. The articles of the Convention on the Law of Treaties ultimately adopted by the Conference on 23 May 1969 relating to reservations are as follows:

"PART I. INTRODUCTION

Article 2

Use of terms

1. For the purposes of the present Convention:

...

(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 2. RESERVATIONS

Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

133/ Official Records of the Conference, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, second session (op. cit. (footnote 127)), 10th plenary meeting, para. 74. The reversal of the presumption may, however, seem less innocuous.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless the contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

61. This brief survey of the preparatory work on the provisions of the 1969 Vienna Convention relating to reservations calls for the following comments:

(i) Their gestation was laborious and difficult; often lively differences of opinion between the members of the Commission and between States and groups of States were, in many cases, settled only by means of compromises based on judicious ambiguities;

(ii) The most remarkable of these ambiguities results from the exact role of the "criterion" of the compatibility of the reservation with the object and purpose of the treaty, to which the Convention "doctrinally" pays tribute, but from which it does not draw any clear-cut conclusions;

(iii) Despite resistance and hesitation, the history of these provisions shows a definite trend towards an increasingly stronger assertion of the right of States to formulate reservations;

(iv) The system finally adopted might be characterized more as "consensual" than as "flexible" in the sense that, ultimately, the contracting States may change the system of reservations and objections as they see fit and practically without restriction, either in the treaty itself or, if the treaty is silent in this regard and except in the case of treaties whose integrity must be preserved for some reason and of the constituent instruments of international organizations, through inter-related multilateral instruments.

Section 2. Succession of States in respect of treaties

62. A short while after the adoption of the Vienna Convention on the Law of Treaties, Sir Humphrey Waldock, who, in 1967, had been appointed Special Rapporteur on succession of States in respect of treaties, submitted his third report on the topic to the Commission. The report contained a draft article 9 on "Succession in respect of reservations to multilateral treaties", 134/ its purpose being to determine "the position of the successor State in regard to reservations, acceptances and objections". 135/

63. After referring to certain "logical principles" 136/ and noting that the - still developing - practice of depositaries was not wholly consistent, with them, 137/ the Special Rapporteur concluded:

134/ Yearbook ... 1970, vol. II, A/CN.4/224 and Add.1, pp. 46-52.

135/ Ibid., p. 47.

136/ Ibid., p. 47.

137/ Ibid., p. 46-50.

"That a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred". 138/

64. Accordingly, he proposed that rules should be adopted to reflect:

A presumption in favour of succession to the reservations of the predecessor State unless the successor State has expressed a contrary intention or unless, by reason of its object and purpose, the reservation is appropriate only to the predecessor State (para. 1);

The possibility for the successor State to formulate new reservations, in which case (1) the successor State is considered to have withdrawn any different reservations made by the predecessor State; and (2) the provisions of the treaty itself and of the Vienna Convention on the Law of Treaties apply to the reservations of the successor State (para. 2);

The application of these rules, mutatis mutandis, to objections to reservations (para. 3 (a)), 139/ although, "in the case of a treaty falling under article 20, paragraph 2, of the Vienna Convention, 140/ no objection may be formulated by a new State to a reservation which has been accepted by all the parties" (para. 3 (b)). 141/

65. The proposals were examined only in 1972 and did not give rise to very lively discussions. 142/ The Commission endorsed the "pragmatic and flexible approach to the treatment of reservations and objections" 143/ recommended by its Special Rapporteur. 144/ Apart from drafting changes, it made only one really substantive amendment to his draft: Article 15 (which replaced draft article 9), paragraph 1 (a), stipulated that only a reservation "incompatible" with that of the predecessor State on the same subject (and no longer a "different" reservation) replaced it. 145/

138/ Ibid., p. 50.

139/ Ibid., pp. 47 and 51-52.

140/ See footnote 60 above.

141/ Op. cit., footnote 134, pp. 47 and 51-52.

142/ Yearbook ... 1972, vol. I, 1166th, 1167th and 1187th meetings, pp. 92-99 and 213-214.

143/ Ibid., vol. II, A/8710/Rev.1, p. 264.

144/ See footnote 64 above.

145/ Op. cit., footnote 143, p. 260.

66. However, in his first report in 1974, Sir Francis Vallat, who had been appointed Special Rapporteur, endorsed a proposal made by Zambia 146/ and the United Kingdom 147/ and returned if not to the letter at least to the spirit of the Waldock proposal, though he described the change in question as minor. 148/ Subject to a further drafting change, the Commission agreed with him on that point. 149/

67. Moreover, the text emerged from its consideration in the Drafting Committee 150/ somewhat "pruned". In particular, paragraph 3 (b) referred to above (see footnote 64), which, it was rightly said, dealt with the general law applicable to reservations and was not concerned with a problem specific to State succession, was deleted. 151/

68. On the other hand, it is interesting to note that the Special Rapporteur did not take up two other sets of proposals put forward with some insistence by a few States, namely:

> Proposals made, inter alia, by the Austrian, Belgian, Canadian and Polish Governments to reverse the presumption (of continuity) in paragraph 1; 152/ and
>
> The wish expressed by the Polish Government for an express provision that the successor State would not automatically succeed to the objections of the predecessor State to reservations formulated by third States. 153/

The Commission did not endorse those suggestions either. 154/

146/ Official Records of the General Assembly, Twenty-seventh session, Sixth Committee, 1327th meeting, para. 24.

147/ Yearbook ... 1974, vol. II (Part One), A/CN.4/278 and Add.1, p. 52.

148/ Ibid., p. 54.

149/ Yearbook ... 1974, vol. II (Part One) (A/9610/Rev.1), p. 222 (renumbered art. 19).

150/ Yearbook ... 1974, vol. I, 1272nd meeting, pp. 112-118 (discussion in the Commission on the Special Rapporteur's proposals) and 1293rd meeting, pp. 239-240 (discussion in the Commission on the Drafting Committee's proposals).

151/ Ibid., p. 240.

152/ Op. cit., footnote 147, pp. 52-53.

153/ Ibid., p. 54.

154/ Op. cit., footnote 150, p. 118, and op. cit., footnote 149, p. 226.

69. This provision gave rise to little discussion at the United Nations Conference on Succession of States in respect of Treaties, which met in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978. Even though some States again proposed that the presumption in paragraph 1 should be reversed having regard to the "clean slate" principle, 155/ the Committee of the Whole, and then the Conference itself, approved the article on reservations, (which had become article 20) as proposed by the International Law Commission, apart from some very minor drafting adjustments.

70. The article reads:

"Article 20

Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject-matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation."

71. It is interesting to note that this article, whose drafting gave rise to little discussion,

(i) Sets forth, in a concise manner, the rules governing succession of States to reservations (but does not deal with the question of what to do about objections to reservations formulated by the predecessor State); 156/

155/ See Official Records of the United Nations Conference on Succession of States in respect of Treaties, vol. III, (Documents of the Conference (A/CONF.80/16/Add.2, pp. 115-116)). See also the analytical compilation of comments of Governments on the final draft articles on succession of States in respect of treaties (working paper prepared by the Secretariat, A/CONF.80/5, pp. 227-230).

156/ See footnote 68 above.

(ii) Otherwise, simply refers to articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties, 157/ whose authority is thus strengthened; and

(iii) Confirms the open, flexible and consensual approach adopted in 1969. 158/

Section 3. Treaties concluded between States and international organizations or between two or more international organizations

72. In accordance with the recommendation set forth in the resolution adopted by the United Nations Conference on the Law of Treaties relating to article 1 of the Vienna Convention on the Law of Treaties 159/ and in General Assembly resolution 2501 (XXIV), the Commission decided, in 1970, to include in its general programme the question of treaties concluded between States and international organizations or between two or more international organizations; and, in 1971, it appointed Paul Reuter Special Rapporteur for the topic.

73. In 1975, the Special Rapporteur submitted to the Commission his fourth report, the first to deal with reservations at length. 160/ In the general commentary to section 2 dealing with reservations, Paul Reuter made comments of a general nature which should be quoted at length, since they shed light on all the subsequent discussions.

74. The Special Rapporteur first stated the principle that the inclusion in the draft of provisions on reservations met a logical need in law, but that it should be of only limited practical interest:

> "(1) Articles 19 to 23 of the 1969 Convention, dealing with reservations, are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the regime of multilateral conventions. It must therefore be admitted at the outset that analogous provisions prepared with the object of the present draft articles in mind are only of limited immediate practical interest. It has been said, and should be constantly repeated, that treaties concluded by international organizations are almost always bilateral treaties, for which

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157/ See footnote 60 above. The actual referral procedure was, however, sharply criticized in the Commission: see op. cit., footnote 142, 1167th meeting, pp. 98-99, and 1187th meeting, pp. 213-214; op. cit., footnote 143, p. 265; op. cit., footnote 150, 1272nd meeting, p. 115 and p. 117; but the objection related to methodology, not to substance.

158/ See footnote 61 above.

159/ See op. cit., footnote 127, Documents of the Conference (doc. A/CONF.39/26).

160/ Yearbook ... 1975, vol. II, A/CN.4/285, pp. 36-38.

reservations may come into play in theory but are of no interest in practice. The few multilateral treaties to which international organizations are parties are all treaties which fall under the provisions of article 20, paragraph 2; in other words, they only allow a very limited play to the reservations mechanism. Multilateral treaties open to a large number of signatories constitute the area in which reservations have a real practical function, and it is well-known that at present there are still very serious obstacles to the accession of international organizations to such treaties. To devote draft articles to reservations, therefore, meets a logical need which is only beginning to emerge in concrete form". 161/

75. Having made that comment, he none the less considered that there was no valid reason for denying international organizations the right to formulate reservations on the same conditions as States so long as they had been fully accepted into the treaty regime as "parties", to enable them to defend their own interests. The Special Rapporteur did not hide the fact that this principle could lead to "all sorts of complications", but he considered that that was part of a more general problem, involving the risks of overlapping jurisdiction as between the organization and its member States, and this explains why "it cannot be accepted without precautions that an organization should be party to a treaty at the same time as its own members". 162/

76. Consequently Paul Reuter submitted, without any special commentary, draft articles 19 to 23, which were closely modelled on the corresponding provisions of the 1969 Vienna Convention, subject only to minor drafting changes. 163/

77. The discussion of the draft articles at the twenty-seventh session 164/ revealed how difficult the problems they caused were. The two main problems were summarized by the Special Rapporteur in his fifth report, which was submitted in 1976 and dealt entirely with reservations:

"The first may be summed up as follows: is it necessary to provide, in certain cases and on certain points, for a regime fundamentally different from that of the Vienna Convention? The second, which goes beyond the scope of the problem of reservations but arises very clearly in that connection, is the following: what provisions are needed to define clearly the respective spheres of application of the draft articles and

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161/ Ibid., p. 36.

162/ Ibid., p. 37.

163/ Ibid., pp. 37-38.

164/ Yearbook ... 1975, vol. I, 1348th to 1350th meetings, pp. 237-249.

the 1969 Vienna Convention, especially when a treaty originally designed to establish treaty relations between States and international organizations loses that character wholly or partially?". 165/

78. With regard to the first point, it suffices to recall that the Commission finally decided not to adopt a rigid position of principle. As it states in its final commentary to the draft articles, it sought to take

> "a balanced view denying organizations some of the facilities granted to States by the Vienna Convention and applying to organizations certain rules whose flexibility had been considered appropriate for States alone. However, it has maintained for international organizations the benefit of the general rules of consensuality wherever that presented no difficulties and seemed to be consistent with certain trends emerging in the modern world". 166/

79. The Commission's response to the first problem raised by the Special Rapporteur 167/ testifies to this pragmatic and balanced approach, which has no other purpose than to meet the needs "of the modern world".

80. As a first step, Paul Reuter, responsive to certain forthright views stated by some members, 168/ thoroughly revised his draft articles 19 and 20, making them much less accommodating of the freedom to make reservations: 169/ the new draft article 19 reversed the presumption and stated the principle that any reservation was prohibited unless:

> It was expressly authorized by the treaty (para. 1 (a));
>
> It was "expressly accepted by all the States and international organizations parties" to the treaty (para. 1 (b));
>
> Or if the international organizations were parties to the treaty on the same footing as States, under the conditions laid down in the 1969 Vienna Convention.

81. The Commission did not take a definitive position in 1975 170/ and, the following year, the Special Rapporteur made new proposals, reverting to

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165/ Yearbook ... 1976, vol. II, (Part One), A/CN.4/290 and Add.1, p. 139.

166/ Yearbook ... 1982, vol. II, (Part Two), A/37/10, para. 43, p. 13.

167/ See footnote 77 above.

168/ In particular, Ushakov, op. cit. (footnote 164), p. 239.

169/ Ibid., p. 246.

170/ Yearbook ... 1975, vol. II, doc. A/10010/Rev.1, para. 135, pp. 170-171.

the principle of the "freedom to formulate reservations combined with a number of exceptions for treaties between two or more international organizations, and the application to reservations of an express authorization regime with certain exceptions for treaties between States and international organizations", 171/ in order to take into consideration the difference of nature between States and organizations and to prevent organizations from formulating reservations affecting the rights or duties of States. 172/

82. These proposals were accepted in principle by the Commission after protracted discussion at its twenty-ninth session. 173/ But the system adopted was profoundly transformed and complicated in its details, 174/ since it resulted in a separation of the regime applicable to reservations to treaties concluded between several organizations - aligned with that of the 1969 Vienna Convention - and the regime applicable to reservations to treaties concluded between organizations and States, which was restrictive for organizations and liberal for States; 175/ the same separation was made in the cases of objections 176/ and of the acceptance of reservations. 177/

83. After the adoption of the draft text on first reading, the Special Rapporteur was prompted to re-examine it in his tenth report in 1981 178/ in the light of the comments of States and international organizations. Declining to consider any possibilities other than the ones envisaged in the draft articles, although some States had invited him to do so, "because such an investigation would not be in the spirit of the Vienna Convention, which sought to allow practice of some measure of freedom so that the general principles laid down in the Convention could be given concrete application", 179/ Paul Reuter came out in favour of the maintenance of the draft articles with some clarification and simplification of the text.

171/ Op. cit. (footnote 165), p. 139.

172/ Ibid., p. 140.

173/ Yearbook ... 1977, vol. I, 1429th to 1435th, 1446th, 1448th, 1451st and 1464th meetings, pp. 71-103, 165-170, 177-181, 193-196 and 256-257.

174/ Ibid., vol. II (Part Two), doc. A/32/10, pp. 96-98 and 105-116.

175/ Arts. 19 and 19 bis.

176/ Art. 19 ter.

177/ Arts. 20 and 20 bis.

178/ Yearbook ... 1981, vol. II (Part One), doc. A/CN.4/341 and Add.1, pp. 56-64.

179/ Ibid., para. 64, p. 59.

84. However, following discussions which were again difficult, 180/ the Commission reverted, essentially, to the provisions which had originally been proposed by the Special Rapporteur 181/ and which sought to transpose the rules contained in draft articles 19 to 23 of the 1969 Convention - by means of an addition to article 19 (a) 182/ - subject to three substantive differences affecting article 20: 183/

(i) The removal from paragraph 2 of all reference to the limited number of negotiating States;

(ii) The deletion of paragraph 3 concerning the constituent instruments of international organizations; and

(iii) The omission of any period for the acceptance of a reservation by an international organization, remedies for the problems resulting from this omission being left to the practice.

85. After further discussion 184/ and for reasons connected with the adoption of a draft article 5 corresponding to article 5 of the 1969 Vienna Convention, 185/ the Commission restored paragraph 3 of article 20, but, for the rest of the text, approved the 1981 draft in 1982. 186/ This text was transmitted with the relevant commentary to the General Assembly, which,

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180/ Yearbook ... 1981, vol. I, 1648th to 1652nd and 1692nd meetings, pp. 28-54 and 263-265.

181/ See footnote 76 above.

182/ For the text of article 19 of the 1969 Convention, see footnote 60 above. The addition made it clear that a reservation was possible "unless (a) the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited". The commentary does not give any explanation of this change; however, see the explanation given by Reuter at the 1986 Vienna Conference (A/CONF.129/C.1/SR.11, p. 6).

183/ Yearbook ... 1981, vol. II (Part Two), doc. A/36/10, pp. 138-139. For the text of article 20 of the 1969 Convention, see footnote 60 above.

184/ Yearbook ... 1982, vol. I, 1727th and 1748th meetings, pp. 177-178 and 316.

185/ Article 5 reads as follows: "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant roles of the organization".

186/ Yearbook ... 1982, vol. II (Part Two), doc. A/37/10, pp. 32-37.

in its resolution 38/86 of 13 December 1984, convened the United Nations Conference on the Law of Treaties between States and International Organizations, which was held in Vienna from 18 February to 21 March 1986.

86. Moreover, in its resolution 40/76 of 11 December 1985, the General Assembly transmitted to the Conference "a list of draft articles of the basic proposal [these were the draft articles of the International Law Commission], for which substantive consideration is deemed necessary". This list included article 19 ("Formulation of reservations") and article 20 ("Acceptance of and objection to reservations"), which had been the subject of various comments and observations by States and international organizations. 187/

87. Several amendments were submitted to articles 19 and 20 at the Conference itself. 188/ These amendments consisted of

Deleting the new language added to article 19 (a); 189/

Limiting the right of international organizations to formulate reservations to the area of their competence as such or to reservations compatible with their constituent instruments;

Setting a period during which organizations may formulate objections to reservations;

Restoring, in article 20, paragraph 2, the idea that unanimity of acceptance is required when such a requirement is made necessary not only by the object and purpose of the treaty, but also by the limited number of negotiating participants.

88. At the end of the discussion 190/ - which focused mainly on the question of the extent to which, for the purposes of these provisions, international organizations could be assimilated to States and enjoy the same rights and have the same duties as States - the Conference adopted articles

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187/ See the "Analytical compilation of comments and observations by States and principal international intergovernmental organizations on the final draft articles on the law of treaties between States and international organizations or between international organizations", a working paper prepared by the Secretariat (doc. A/CONF.129/5, 8 October 1985), pp. 137-144.

188/ See the report of the Committee of the Whole (doc. A/CONF.129/C.1/L.74/Add.2, pp. 11-14, and Add.3, pp. 1-5).

189/ See footnote 182 above.

190/ See A/CONF.129/C.1/SR.11 to 14.

which assimilated organizations more closely to States, 191/ something the Commission's draft articles did not do, and were more closely modelled on the articles of the 1969 Vienna Convention on the Law of Treaties.

89. The relevant articles of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted by the Conference on 21 March 1986, read as follows:

"PART I

INTRODUCTION

Article 2

Use of terms

1. For the purposes of the present Convention:

(...)

(d) 'reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 2. RESERVATIONS

Article 19

Formulation of reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

191/ Especially with regard to the acceptance period (art. 20, para. 5).

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State or organization and for the accepting State or organization;

(b) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

90. The main problems encountered during the preparatory work on these provisions were of a technical nature and related, in this case, to the difficulties of transposing to international organizations the rules applicable to States or of combining them or to difficulties of an ideological and doctrinal nature owing to the hostility of certain States - mainly the industrialized countries with, at the time, centrally planned economies - to the notion of according broad competence to organizations, a hostility which seemed to lose its edge as the work progressed. On the other hand, the rules on reservations contained in the 1969 Convention were not in principle contested at any stage. The reaffirmation of these rules in the 1986 Convention further strengthens their authority.

CHAPTER II

BRIEF INVENTORY OF THE PROBLEMS OF THE TOPIC 192/

91. In his first report on the law of treaties, Sir Hersch Lauterpacht noted that "the subject of reservations to multilateral treaties is one of unusual - in fact baffling - complexity and it would serve no useful purpose to simplify artificially an inherently complex problem". 193/ Like an echo almost 30 years later, Paul Reuter noted in turn: "... the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention may not have eliminated all these difficulties". 194/

92. In general, authors share this view and emphasize that the three relevant Vienna Conventions (1969, 1978 and 1986) 195/ have allowed major uncertainties to persist with regard to the legal regime applicable to reservations. Moreover, such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations, especially when they are confronted with difficult concrete problems when acting as depositaries. 196/

192/ This chapter consists of a revised, corrected and slightly expanded version of Part 2 of the outline submitted in 1993, document A/CN.4/454, pp. 47-66.

193/ Op. cit. (footnote 39), p. 124.

194/ Op. cit. (footnote 178), para. 53, p. 58. See also op. cit. (footnote 184), p. 33.

195/ See above, chapter I of this report.

196/ In accordance with the Commission's usual working methods, the Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations, at the request of the Special Rapporteur, sent a letter on 14 December 1994 to his colleagues in all the specialized agencies, the Council of Europe, the Organization of American States and the Organization of African Unity, requesting them to communicate any relevant information about the practice of their organization with regard to reservations. As of 15 May 1995, the following organizations had responded to this request: Council of Europe, Food and Agriculture Organization of the United Nations, International Monetary Fund, International Civil Aviation Organization, Organization of American States, International Labour Organization, International Maritime Organization, World Intellectual Property Organization and International Telecommunication Union. In addition, there is a wealth of documentation produced by the Secretariat on the practice of the Secretary-General of the United Nations. It was not possible to use all this information in this report; it nevertheless shows that many problems persist with regard to reservations and it will be particularly useful for the further consideration of the topic. The Special Rapporteur wishes to express his

93. The very abundance of literature devoted to reservations to treaties testifies to the fact that doctrine is consistently confusing with regard to problems which are highly technical and extremely complex, but of exceptional practical importance. There is hardly any need to recall, in this connection, the abundance of articles devoted to reservations in works dealing with the law of treaties as a whole, 197/ and even in the treaties and manuals on general international law. To this should be added the large number of monographs devoted to the study of national practice in the area of reservations, to reservations to a particular convention or a particular type of treaty, or to some specific issues. The bibliography annexed to this report, which does not claim to be exhaustive, gives an idea of the abundance of these doctrinal works, often of high academic quality, whose "flow rate" has not slowed since 1969 - quite the contrary.

94. In other words, although it can legitimately be maintained that the regime of reservations, as it has emerged from the 1969 Vienna Convention on the Law of Treaties and subsequent conventions, constitutes a success, 198/ many questions nevertheless persist and the implementation of the regime has not always proceeded without problems; and for a quarter of a century, the solutions to these problems found by practice and jurisprudence have certainly helped to complicate even further the problems of the topic.

95. In a very pragmatic manner and without attempting at this stage to incorporate these elements into a global statement of the problems, this preliminary report does endeavour in the following sections to present an inventory of the problems pending owing:

Either to ambiguities in the provisions on reservations in the Vienna Conventions on the Law of Treaties;

Or to gaps in these provisions.

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sincere gratitude to the international organizations which through their cooperation have enabled him to obtain a fuller and more accurate picture of the problems and the solutions brought to them in practice.

197/ See more particularly, and only as examples, among the most current works on the law of treaties: Suzanne Bastid, Les traités dans la vie internationale, Economica, Paris, 1985, pp. 72-77; Jean Combacau, Le droit des traités, P.U.F., "Que sais-je", No. 2613, Paris, 1991, pp. 53-63; Taslim O. Elias, The Modern Law of Treaties, A.W. Sijthoff, Leiden, 1974, pp. 27-36; Lord McNair, The Law of Treaties, Clarendon Press, Oxford, 1961, pp. 158-177; Paul Reuter, Introduction au droit des traités, P.U.F. - U.H.E.I., Paris, 1985; Shabtai Rosenne, Developments in the Law of Treaties 1945-1986, Cambridge, U.P., 1989, pp. 430-436; Ian Sinclair, op. cit. (footnote 12), pp. 51-82.

198/ See chapter III above.

Section 1. The ambiguities of the provisions relating to reservations in the Vienna Conventions on the Law of Treaties

96. It has been endlessly reiterated that: "The question of reservations to multilateral treaties has been one of the most controversial subjects in contemporary international law". 199/ These controversies have been both doctrinal and political 200/ and, as pointed out above, 201/ the differences have been overcome only by compromises based on ambiguities or carefully judged silences. The ambiguity is most obvious with respect to the permissibility of reservations and to their effects, since the second problem, that of effects, is closely linked to the regime of objections.

1. The permissibility of reservations

97. In the 1993 outline on "The law and practice relating to reservations to treaties", the (future) Special Rapporteur stated that to his mind the "determination of the validity of reservations" was probably the point on which "the ambiguity of the provisions of the 1969 and 1986 Vienna Conventions is most obvious". 202/ The term "validity of reservations" was criticized at the time by Professor D.W. Bowett, who thought that the notion "confuses two different questions, namely permissibility of a reservation, and the opposability of a reservation (i.e. whether it can be invoked against another Party)". 203/

98. Since the Commission used this term in its report on the work of its forty-fifth session, 204/ the representative of the United Kingdom stated in the Sixth Committee on 2 November 1993 that:

199/ J.M. Ruda, op. cit. (footnote 46), p. 95. See also I. Sinclair, op. cit. (footnote 12), p. 77.

200/ As William W. Cox suggested in 1952, there can be little doubt that "the source of much of the doctrinal discord which followed the [1951] Court's opinion is really to be found in the 'Cold War'", "Reservations to Multipartite Conventions", Proceedings of the American Society of International Law, 46th Annual Meeting, April 24-26, 1952, Washington, D.C., p. 29.

201/ See paras. 45, 51, 57 and 61 above.

202/ See footnote 9, p. 56.

203/ ILC/WG/LTPW/93/1/Add.1, p. 4.

204/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10, document A/48/10, para. 428, p. 245; the Commission stated that the "validity of reservations" was a question which "encompasses that of the conditions for the lawfulness of reservations and that of their applicability to another State".

"His delegation experienced some unease over the Commission's use of the term 'validity of reservations' in paragraph 428 of its report. While the context indicated what the Commission had in mind, the wording used could be interpreted as presupposing the possibility that a statement conditioning the consent of an adhering State to be bound by a treaty might by some means be held to be a nullity. In fact, article 2 (d) of the Vienna Convention, by referring to a reservation not only as a 'unilateral' statement which 'purported' to achieve an exclusion or modification of treaty terms, but even more so articles 19 et seq., in their careful references to 'formulation' of reservations, made it plain that any such statement was ipso facto a 'reservation', but that its legal effect remained to be determined by the rules which followed. That emerged with great clarity from the Commission's commentary on articles 17 to 19 of the 1962 draft and explained why, in the usage of the Vienna Convention, even the cases expressly prohibited, or those incompatible with the object and purpose of a treaty, were referred to in article 19 as 'reservations', and why article 21 referred to a reservation 'established' with regard to another party". 205/

99. In fact, to the mind of the author of the outline, the word "validity" was fairly neutral and did indeed encompass the question of the opposability of the reservation which, in his view, is closely linked to the question of the legal regime of objections, even though it does not necessarily depend exclusively on that regime. Moreover, if the word "permissibility" seems more appropriate, there is no problem in using it. It is in fact more accurate.

100. However, it must be borne clearly in mind that the explanations offered both by Professor Bowett and by the British Government in support of their opposition to use of the word "validity" assume the prior solution of the problem which lies at the centre of the controversies in this matter. This is the problem: can the question of the permissibility or impermissibility of a reservation be decided "objectively" and in the abstract or does it depend in the end on a subjective determination by the contracting States? To take a concrete example: can a reservation which obviously clashes with the object and purpose of the treaty, or even a reservation prohibited by the treaty, but accepted by all the other parties to the treaty, be described as an "impermissible" reservation?

101. The reply implicit in the explanations mentioned above is in the affirmative: for Professor Bowett and for the British Government, such a reservation is impermissible and the question of opposability arises only at a second stage and, it appears, only in respect of permissible reservations. This, moreover, was the thesis argued by Professor Bowett in 1977:

"The issue of 'permissibility' 206/ is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of

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205/ A/C.6/48/SR.24, para. 42.

206/ It is not obvious that "permissibility" and "lawfulness" are absolute synonyms.

whether, as a matter of policy, other Parties find the reservations acceptable or not. The consequence of finding a reservation 'impermissible' may be either that the reservation cannot be accepted by a Party holding it to be impermissible or that the impermissible reservation nullifies the State's acceptance of the treaty as a whole". 207/

102. This particularly authoritative opinion represented the quintessence of one of the doctrinal standpoints, which has been described as the "permissibility school", in contrast to the "opposability school". 208/ For writers who claim allegiance to this second school, in the Vienna Convention system, "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State". Hence, article 19 (c) is seen "as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that". 209/

103. It is certainly too early for the Commission to come out in favour of one or other of these theses or to try to reconcile them. They have been mentioned briefly here only to show the importance of the doctrinal debate which was and is still generated by the reservations provisions of the 1969 and 1986 Vienna Conventions.

104. It is certain that, if these two theses were pushed to their limits, they would have very different practical consequences. For example, according to the "opposability" thesis, it could be argued that dispute settlement organs, whether jurisdictional or not, ought to refrain from ruling on the permissibility of a reservation if there is no objection by the other

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207/ Derek W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", British Year Book of International Law, 1976-1977, p. 88. The British Government seems to exclude the second possibility.

208/ See Jean Kyongun Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision", Harvard International Law Journal, 1982, pp. 71-116, passim, in particular, pp. 75-77; see also Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multinational Treaties", British Year Book of International Law, 1993, pp. 243-282, in particular, pp. 263-269, and Ian Sinclair, op. cit. (footnote 12), p. 81, footnote 78.

209/ J.M. Ruda, op. cit. (footnote 46), p. 190. For similar standpoints, see Jean Combacau, op. cit. (footnote 197), p. 60; Giorgio Gaja, "Unruly Treaty Reservations", Le Droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago, Giuffrá, Milan, 1987, vol. I, pp. 313-320; Pierre-Henri Imbert, Les réserves aux traités multilatéraux, Pédone, Paris, 1979, pp. 134-137; Paul Reuter, op. cit. (footnote 197), p. 74, or Karl Zemanek, "Some Unresolved Questions concerning Reservations in the Vienna Convention on the Law of Treaties", Etudes de droit international en l'honneur du Juge Manfred Lachs, Nijhoff, The Hague, 1984, pp. 331-333.

parties. 210/ In contrast, the "permissibility" thesis might give the impression that an objection to a reservation which is incompatible with the object and purpose of the treaty or prohibited by the treaty has no particular effect, since the reservation is in any event null and void.

105. The issues underlying the doctrinal differences described briefly above are difficult and, once again, there can be no question of resolving them at this preliminary stage - while acknowledging that they must be resolved. Moreover, it may be asked whether the analysts, 211/ by emphasizing the conflicts between the two "schools", of "opposability" and of "permissibility", have not exaggerated their differences. They certainly start from different analyses of articles 19 and 20 of the 1969 and 1986 Vienna Conventions, but

(i) They do have a number of common positions;

(ii) Which prompt the adherents of the two theses to ask themselves often identical questions; and

(iii) The essential difference in the replies to these questions is that the supporters of "opposability" think that permissibility and opposability go hand in hand (hence, often, the use of the word "validity"), whereas the "permissibility" enthusiasts think that these are clearly separate problems which must be examined in sequence;

(iv) In all cases, however, the will of the contracting States must prevail, but, depending on the standpoint, the emphasis will be placed on the initial will of the negotiators or on the subsequent will of the States making reservations or objections.

106. All the writers who have studied the problem acknowledge that there is a presumption in favour of the permissibility of reservations. This is, moreover, consistent with the clear text of article 19 of the two Vienna Conventions and is confirmed by study of the preparatory work. 212/

210/ This is not the case in practice. See for example the judgements of the European Court of Human Rights in the Belilos Case (29 April 1988, series A, No. 132, paras. 50-60) or the Weber Case (22 May 1990, series A, No. 177) or the decision of the European Commission of Human Rights in the Chrysostomos et al. v. Turkey case, Revue universelle des droits de l'homme, 1991, p. 193. See also General Comment No. 24 adopted by the Human Rights Committee on 2 November 1994, document CCPR/C/21/Rev.1/Add.6, para. 18. The peculiar nature of human rights treaties might, however, limit the value of these precedents.

211/ See footnote 208 above.

212/ See paras. 38 and 53 above.

107. Everybody also agrees that this presumption is not invulnerable and that it falls

> If the reservation is prohibited explicitly 213/ or implicitly 214/ by the treaty;
>
> Or if it is "incompatible with the object and purpose of the treaty". 215/

108. It remains to be seen - and it is here that the real problems arise - on the one hand, how to determine whether these conditions are met and, on the other hand, what the effects may be of a reservation which would be impermissible according to these criteria.

109. On the first point, the compatibility of the reservation with the provisions of the treaty relating to reservations, 216/ problems can arise, in particular, when the reservation is vague and general. 217/ But it is primarily the determination of the compatibility of the reservation with the object and purpose of the treaty which causes the problems. As Paul Reuter put it, "if the treaty is silent, the only prohibited reservations are those which would be incompatible with its 'object and purpose', a concept again used by the Vienna Convention, although its interpretation remains as uncertain as when it first appeared in the Court's advisory opinion of 1951". 218/ Therefore, it would no doubt be appropriate for the Commission to undertake a study of the very notion of "object and purpose of the treaty". 219/

213/ Art. 19 (a).

214/ Art. 19 (b).

215/ Art. 19 (c). It can be added that the presumption also falls if the integrity of the treaty is an essential condition for its application and if all the parties have not accepted the reservation (art. 20, para. 2) or if the competent organ of an international organization has not accepted a reservation to its constituent instrument (art. 20, para. 3); but in these two cases it is undeniable that the permissibility of the reservation depends exclusively on its acceptance.

216/ Art. 19 (a) and (b).

217/ See William A. Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", article to appear in Annuaire canadien de droit international, 1995, typewritten version, p. 173.

218/ Op. cit. (footnote 197), p. 74.

219/ Which is found in other provisions of the Vienna Conventions: cf. art. 18 and art. 31, para. 1.

110. Still from this standpoint, it can be further noted that these uncertainties are not dispelled, but are, on the contrary, intensified, by article 20, paragraph 2, of the 1969 and 1986 Conventions, which reintroduces the criterion of the object and purpose of the treaty with respect to restricted multilateral treaties ("plurilateral" treaties) and seems to imply a contrario that "a reservation running counter to the object and purpose of a treaty may be authorized if it is accepted by all the parties". 220/ Moreover, the definition of these treaties themselves - and, therefore, the conditions of application of article 20, paragraph 2 - remains extremely uncertain. 221/

111. However, it is "downstream" of this first category of problems that the most difficult questions arise; these are also the questions which generate most doctrinal discussion. 222/

112. Let us suppose that a reservation seems "impermissible", either because it is prohibited by the treaty or because it is incompatible with the treaty's object or purpose. What happens then?

Must the reservation be regarded as void, but the expression of consent to be bound by the treaty as valid?

On the contrary, does the impermissibility of the reservation affect the reliability of the expression of consent itself?

Does the impermissibility of the reservation produce effects independently of any objections which may be raised to it?

At most, have the other contracting States (or international organizations) an obligation in such circumstances to raise an objection to an impermissible reservation?

Or may they, rather, accept such a reservation, either expressly or tacitly?

220/ Paul Reuter, op. cit. (footnote 195) p. 74. See also C. Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties - Comments on Articles 16 and 17 of the International Law Commission's Draft Articles on the Law of Treaties", Zeitschrift für ausländisches öffentliches Recht, 1967, p. 479.

221/ See P.-H. Imbert, op. cit. (footnote 209), pp. 109-120, or Jacques Dehaussy, "Le problème de la classification des traités et le projet de Convention établi par la Commission du droit international des Nations Unies", Recueil d'études de droit international en hommage à Paul Guggenheim, Institut Universitaire des Hautes Etudes Internationales, Geneva, 1968, pp. 306-328.

222/ See paras. 100-104 above.

113. These, it seems, are some of the main questions which arise in connection with the permissibility of reservations and which will perhaps receive the Commission's attention.

114. However, four points must be made clear:

(i) The questions raised above 223/ are, in the Special Rapporteur's opinion, the principal and most difficult questions, but they are not necessarily the only ones; others remain not entirely resolved: for example, who is competent to determine the permissibility of a reservation (including a reservation to the constituent instrument of an international organization), whether a reservation can be partly impermissible or whether a State making an impermissible reservation may, once its impermissibility has been determined, either regard itself as freed from its treaty obligations or formulate a new reservation, 224/ etc.?;

(ii) The purpose of this preliminary report is not to outline answers to these questions; it is only to note that they arise and that it would certainly be useful to give some thought in the future to possible answers to them;

(iii) To this end, the Special Rapporteur proposes, if the Commission agrees, to undertake a systematic study of the practice of States and international organizations. However, the possibility of such a study proving a disappointment cannot be ruled out: a preliminary cursory review seems to show that this practice is relatively scarce and that there are prima facie uncertainties;

(iv) Furthermore, the debate is far from being a purely doctrinal one and, whatever the uncertainties of practice - or because of them - these questions worry States and international organizations acting as depositaries. 225/ For example, just recently, the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, meeting in Strasbourg on 21 and 22 March 1995, took up the question of reservations to multilateral treaties; the discussion, introduced by an Austrian working paper, once again focused essentially on the question of the permissibility of reservations and the effects of an impermissible reservation. 226/

223/ Paras. 109, 110 and 112.

224/ Cf. the consequences of the Belilos case (see footnote 210). See C. Redgwell, op. cit. (footnote 208), pp. 267-268.

225/ See footnote 196 above.

226/ Following the meeting, "the Committee decided that it would be redundant and inappropriate to initiate independent action on reservations at a time when the International Law Commission was itself about to begin its

2. The regime for objections to reservations (the opposability of reservations)

115. The doctrinal controversy referred to in the previous paragraph has significant repercussions on the regime for objections to reservations. It is probably not overstating the case to say that, for those who espouse the thesis of "opposability", 227/ the answers to questions about the permissibility of reservations, 228/ which are wholly subjective, are to be found in the provisions of article 20 of the 1969 and 1986 Conventions: "The validity of a reservation depends, under the Convention's system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty". 229/ The advocates of the "permissibility" thesis on the other hand, take it for granted that an impermissible reservation is not opposable to other contracting States or international organizations; thus "[T]he issue of 'opposability' is the secondary issue and pre-supposes that the reservation is permissible. Whether a Party chooses to accept the reservation, or object to the reservation, or object to both the reservation and the entry into force of the treaty as between the reserving and objecting States is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review" 230/.

116. Irrespective of the merits (or otherwise) of each of these theses, it is certain that these contrasting positions reflect the doctrinal unease that the representatives of States 231/ seem to share with regard to the regime for the acceptance of reservations and objections to reservations which was introduced by articles 20 and 21 of the 1969 Vienna Convention, was restated in the 1986 Convention and is, to say the least, lacking in clarity.

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work on the topic. It agreed that it should follow closely the progress of the deliberations of the International Law Commission and thought that it would be useful to transmit, together with the Austrian paper, a summary of its discussions to the rapporteur of the working group on reservations (sic) of the International Law Commission (this information has been taken from the summary of the discussion transmitted to the Special Rapporteur).

227/ See para. 102 above.

228/ See para. 112 above.

229/ J.M. Ruda, op. cit. (footnote 46), p. 190.

230/ D.W. Bowett, op. cit. (footnote 207), p. 88.

231/ See in particular para. 114 (iv) above.

117. An initial problem 232/ is to determine whether the counterpart to the freedom in principle to formulate reservations 233/ is an equivalent freedom to make objections to reservations. Although arguments both for and against can be found in the body of their texts, the Vienna Conventions are silent on the matter and leave the door open to the most extreme propositions. It can, for example, be argued that an objection is possible only to an impermissible reservation - in other words, the objecting State must be guided by the same rule as the reserving State, namely, the need to preserve the object and purpose of the treaty, or, conversely, that only a permissible reservation is open to objection, since, in any event, an impermissible reservation would be null and void. The question of freedom of objections seems to be particularly difficult to resolve as practice may not be of much help, for States generally refrain from justifying their objections or, if they do so, give reasons that are very vague and difficult to interpret. 234/ The question also arises whether States are not, or should not be, required to justify their objections. 235/

118. When an objection has been formulated, the question that arises is what effect it has. In order not to prejudge the answer to that question - which is advisable at this preliminary stage - it is necessary, once again, to distinguish between objections to permissible reservations, on the one hand, and to impermissible reservations, on the other.

119. The 1969 Vienna Convention makes no such distinction, merely providing that:

> "an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless the contrary intention is definitely expressed by the objecting State". 236/

In this case, "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation". 237/

232/ Which the "permissibility" and "opposability" schools solve in completely opposite ways.

233/ See para. 106 and footnote 212 above.

234/ See C. Redgwell, op. cit. (footnote 208), p. 275, and K. Zemanek, op. cit. (footnote 209), p. 334.

235/ See D.W. Bowett, op. cit., footnote 207, p. 75.

236/ Art. 20, para. 4 (b). The wording of art. 20, para. 4 (c), of the 1986 Convention is the same apart from an added reference to contracting organizations.

237/ Art. 21, para. 3.

120. It may, however, be asked whether these rules can and should be applied when the reservation is impermissible - that is to say, contrary to the provisions of the treaty relating to reservations or incompatible with its object and purpose. In other words, can the objection have the paradoxical result of "cloaking" the impermissibility and, ultimately - apart only from the provisions excluded by the reservation - have the same effect as acceptance, that is to say, make the reserving State a party to the treaty vis-à-vis the objecting State? This is tantamount to conferring on the objection "a value which is comparable to that of an interpretative declaration, seeing the matter in the best possible light". 238/

121. Also, regardless of whether the objection is made to a permissible reservation or to an impermissible reservation, the question arises whether the all-or-nothing system that seems to result from the provisions referred to above 239/ must be rigidly applied if, on the basis of the principle that "The greater includes the lesser", the objecting State could not permit the entry into force as between itself and the reserving State only of particular parties to the treaty designated by it. Such a solution would, moreover, lead to a further question: in that case, would the reserving State be required to submit to the will of the objecting State or could it, in turn, make an "objection to the objection" or refuse to regard the treaty as being in force with that State?

122. These questions are not just a matter of speculation and we have seen, "in treaty practice, some attempts on the part of the objecting States to give to their objections some effects that are not equivalent to those pertaining to acceptance of reservations", 240/ but without, however, going so far as to exclude the entry into force of the treaty as a whole with the reserving State. A conventional basis for such practices, which are apparently still at the tentative stage, may be found in the expression used in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which stipulates that "the provisions to which the reservation relate do not apply (...) to the extent of the reservation". However, it is not always easy to determine "the extent of the reservation" and difficult problems have arisen in this regard, particularly in connection with objections made by Sweden and other States to

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238/ Paul Reuter, op. cit. (footnote 197), p. 75. Similarly, see the arbitral award of 30 June 1977 in the case concerning the Mer d'Iroise Continental Shelf, Reports of International Awards, vol. XVIII, para. 61; J.K. Koh, op. cit. (footnote 208), pp. 102-103; Joseph Nisot "Les réserves aux traités et la Convention de Vienne du 23 mai 1969", Revue générale de droit international public, 1973, p. 203; J.M. Ruda, op. cit. (footnote 46), p. 199; Ian Sinclair, op. cit. (footnote 12), pp. 76-77; and K. Zemanek, op. cit. (footnote 209), pp. 332-333.

239/ See para. 119 above.

240/ G. Gaja, op. cit. (footnote 209), p. 327. See also Richard W. Edwards Jr., "Reservations to Treaties", Michigan Journal of International Law, Spring 1989, pp. 399-400, and K. Zemanek, op. cit. (footnote 209), pp. 335-336.

the Syrian and Tunisian reservations to the Vienna Convention itself. 241/ Once again, therefore, it might be useful to attempt to explain the meaning of the words "the extent of the reservation" in the light of the practice followed by States.

123. Furthermore, the problem does not arise only with regard to objections to reservations. Article 21, paragraph 1, of both Conventions uses the same expression with respect to the legal effect of the reservation itself (which means that it also applies in the case of reservations accepted).

124. While the doctrinal backdrop which sheds light on (or obscures!) the problems dealt with in this section cannot be completely disregarded, it should certainly not be allowed to "impress". Without claiming to put an end to the controversy, the purpose of the above discussion was simply to highlight the ambiguities in the provisions of the 1969 and 1986 Conventions relating to reservations and to pinpoint the main questions that seem to arise. To recapitulate, these questions are as follows:

(i) What is the precise meaning of the expression "compatibility with the object and purpose of the treaty"?

(ii) When should a convention be regarded as a limited multilateral treaty (art. 20, para. 2)?

(iii) Is an impermissible reservation null and void in itself and does its nullity give rise (or not give rise) to the nullity of the expression of consent by the State (or international organization) to be bound?

(iv) Is an impermissible reservation null and void regardless of the objections that may be made?

(v) Can the other contracting States or international organizations accept an impermissible reservation?

(vi) What are the effects of such acceptance?

(vii) If due note has been taken (by whom?) of the impermissibility of a reservation, can the reserving State replace it with another reservation or withdraw from the treaty?

(viii) Are the contracting States free to formulate objections irrespective of the impermissibility of the reservation?

(ix) Must they, or should they, indicate the grounds for their objections?

241/ See Charles de Visscher, "Une réserve de la République arabe de Syrie à la Convention de Vienne (1969) sur les traités", Revue belge de droit international, 1972, pp. 416-418. See also R.W. Edwards Jr., op. cit. (footnote 240), p. 400; P.-H. Imbert, op. cit. (footnote 209), p. 165 and Ian Sinclair, op. cit. (footnote 12), p. 77.

(x) What exactly are the effects of an objection to a permissible reservation?

(xi) And to an impermissible reservation?

(xii) How are such effects distinguishable from the effects of an acceptance of the reservation where the objecting State does not clearly express the intention that the treaty should not enter into force as between it and the reserving State?

(xiii) In such a case, can the objecting State exclude the applicability of treaty provisions other than those covered by the reservation?

(xiv) And is the reserving State required to accept such conclusions?

(xv) Lastly, what is the precise meaning of the expression "to the extent of the reservation"?

125. This list of questions, which is the outcome of a superficial examination of practice and also of an analysis of the provisions of the 1969 and 1986 Conventions, is certainly not exhaustive. Rather, some of the questions are closely interlinked and overlap to a considerable extent, whereas others are more self-contained. There is no doubt that the replies for which they call are uneven in their complexity and, while some are quite obvious, others appear prima facie to be almost impossible to find if approached without preconceived ideas. None the less, the list gives some idea of the extent of the problems to which the ambiguities in the wording of the "treaty of treaties" give rise. There are, in addition, problems that were not dealt with in 1969 and 1986 and the main ones will be listed far more briefly in the section that follows.

Section 2. Gaps in the provisions relating to reservations in the Vienna Conventions on the Law of Treaties

126. The Vienna Conventions of 1969 and 1986 leave a number of general problems unsolved, neglect problems connected with the specific object of certain treaties and remain silent on the drawbacks of certain treaty techniques. The 1978 Convention, for its part, completely skips over certain problems that may arise in connection with reservations in the event of State succession.

1. Some gaps of a general nature

(a) Reservations to bilateral treaties and "interpretative declarations"

127. Satisfactory in so far as it goes, the definition of "reservation" common to the 1969 Convention (art. 2, para. 1 (d)), the 1978 Convention (art. 2, para. 1 (j)) and the 1986 Convention (art. 2, para. 1 (d)) has omissions that give rise to uncertainties which can often be very awkward. The first point left in the dark, while more irritating in theory than important in practice, concerns the possibility of formulating reservations to bilateral treaties. The problem nevertheless arises as a result of the amendment by the Vienna

Conference of the title of Part II, section 2, of the 1969 Convention ("Reservations" instead of "Reservations to multilateral treaties"); the ambiguity of the travaux préparatoires; 242/ and the view of some authors who accept the fact that "reservations may come into play in theory" for bilateral treaties. 243/

128. Of much greater practical concern is the distinction between reservations and the "interpretative declarations" which States seem to resort to with increasing frequency and on which the Conventions are silent. 244/

129. The conclusion to be drawn from a recent judgement is that nominalism must be set aside on this point and that an "interpretative declaration" must be taken to be a genuine reservation if it is consistent with the definition given in the Conventions. In this connection, reference is made to the arbitral award of 30 June 1977 in the Mer d'Iroise case; 245/ the report of the European Commission of Human Rights in the Temeltasch case; 246/ the judgements of the European Court of Human Rights in the Belilos case of

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242/ See R.W. Edwards Jr., op. cit. (footnote 240), pp. 402-405.

243/ See Paul Reuter, fourth report, op. cit. (footnote 160), p. 36.

244/ See, especially, D.M. McRae, "The Legal Effects of Interpretative Declarations", British Year Book of International Law, 1978, and, more generally, on the definition of reservations, John King Gamble Jr., "Reservations to Multilateral Treaties - A Macroscopic View of State Practice", American Journal of International Law, 1980, pp. 373-376; Catherine Logan Piper, "Reservations to Multilateral Treaties: The Goal of Universality", Iowa Law Review, October 1985, pp. 299-300; J.M. Ruda, op. cit. (footnote 46), pp. 103-108; Ian Sinclair, op. cit. (footnote 12), pp. 51-54; and C. Tomuschat, op. cit. (footnote 220), pp. 464-466; etc.

245/ Arbitral award of 30 June 1977, Reports of international arbitral awards, vol. XVIII, p. 175; commentary by D.W. Bowett, British Year Book of International Law, 1978, pp. 1-29; E.A. Boyle, International and Comparative Law Quarterly, 1980, pp. 458-508; E.D. Brown, Yearbook of World Affairs, 1979, pp. 304-327; P.-H. Imbert, Annuaire français de droit international, 1978, pp. 29-58; J.-P. Quéneudec, Revue générale de droit international public, 1979, pp. 53-103; F. Rigaldies, Journal de droit international, 1979, pp. 506-531; E. Zoller, Annuaire français de droit international, 1977, pp. 359-407.

246/ Report dated 5 May 1982, Yearbook of the European Convention on Human Rights, vol. 25; commentary by G. Cohen-Jonathan and J.-P. Jacqué, Annuaire français de droit international, 1982, pp. 524-530; P.-H. Imbert, Revue générale de droit international public, 1983, pp. 530-580 and International and Comparative Law Quarterly, 1984, pp. 558-595.

29 April 1988 247/ and the Loizidou case of 23 March 1995; 247 bis/ and the decision of the United Nations Human Rights Committee in the case of T.K. and M.K. v. France. 248/ But these decisions also testify to the fact that it is extremely difficult to make a distinction between "qualified interpretative declarations" and "mere interpretative declarations". 249/ Furthermore, the legal effects of the latter remain unclear.

(b) Effects of reservations on the entry into force of a treaty

130. This important and widely debated question has caused serious difficulties for depositaries and has not been answered in the relevant conventions. The practice which is followed by the Secretary-General in his capacity as depositary and which was amended in 1975 250/ has been the subject of rather harsh doctrinal criticism. 251/

131. In addition, in an opinion given in 1982, the Inter-American Court of Human Rights expressed the view that a treaty came into force in respect of a State on the date of deposit of the instrument of ratification or accession,

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247/ Series A, No. 132; see the commentaries of I. Cameron and F. Horn, German Yearbook of International Law, 1990, pp. 69-129; G. Cohen-Jonathan, Revue générale de droit international public, 1989, pp. 273-315; J.G. Merrills, Virginia Journal of International Law, 1989, p. 347; S. Marks, International and Comparative Law Quarterly, 1990, p. 300.

247 bis/ See footnote 210 above.

248/ 8 November 1989; Communications Nos. 220 and 222/1987 (doc. A/45/40, vol. II, pp. 122-123, para. 8.6). Commentary by G. Cohen-Jonathan, Annuaire français de droit international, 1989, pp. 429-432.

249/ D.M. McRae, op. cit. (footnote 244), p. 160. The practice of the International Labour Organization in respect of declarations on international labour conventions on which no reservations may be made is of particular interest in this regard.

250/ See Repertory of Practice of United Nations Organs, Supplement No. 5, vol. V, covering the period 1 January 1970 to 31 December 1978, art. 102, p. 187.

251/ See P.-H. Imbert, op. cit. (footnote 209), pp. 277-282, and "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités - Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire", Annuaire français de droit international, 1980, pp. 524-541; see also Henry H. Han, "The U.N. Secretary-General's Treaty Depositary Function: Legal Implications", Brooklyn Journal of International Law, 1988, No. 3, pp. 562-565.

whether or not the State had formulated a reservation. 252/ This position was accepted in some circles, 253/ but other authors doubted whether it was compatible with article 20, paragraphs 4 and 5, of the Vienna Convention. 254/ There are also grounds for asking whether the solution adopted by the Court reflects the specific nature of the Inter-American Convention rather than any general considerations. 255/

(c) Problems unsolved by the 1978 Convention on Succession of States in respect of Treaties

132. Article 20 of the Convention of 23 August 1978 scarcely deals with, much less solves, potential problems arising in connection with reservations in the case of succession of States.

133. First, it should be noted that the article is contained in Part III of the Convention, which deals with "newly independent States"; it therefore applies in the case of the decolonization or dissolution of States, whereas the question of the rules applicable in the case of the succession of a State in respect of part of a territory, the uniting of a State or the separation of a State is left aside completely. It is true that, in the first instance, "treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates" (art. 15 (a)). It is equally true that the extension of treaties of the successor State to the territory (art. 15 (b)) appears to entail necessarily the automatic extension of reservations which the latter might have formulated. Problems nevertheless continue to exist with regard to "newly independent States formed from two or more territories"; on this assumption, articles 16 to 29 (and hence art. 20) probably apply in principle in accordance with article 30, paragraph 1, but, what if the new State fails to denounce any incompatible reservations at the time when the succession is notified? The same problem occurs in the case of the uniting of States, in respect of which the Convention contains no applicable provisions on reservations.

134. Secondly, while article 20, paragraph 1, provides for the possible formulation of new reservations by the new State and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. None the less, this may seem logical if it is recognized that, in

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252/ Advisory opinion of 24 September 1982, Inter-American Court of Human Rights Judgements and Opinions, Series A, No. 2; International Law Reports, 1984, vol. 67, p. 559; International Legal Materials, 1983, vol. 22, p. 37.

253/ See Shabtai Rosenne, op. cit. (footnote 197), pp. 435-436.

254/ See, for example, Richard W. Edwards Jr., op. cit. (footnote 240), pp. 401-402, and G. Gaja, op. cit. (footnote 209), pp. 321-322.

255/ See sect. 2 (b) above.

maintaining a former reservation, the new State is exercising an inherent right and is not acting as though it has the rights of the predecessor State. 256/

135. Lastly, and this is a serious lacuna, article 20 makes no reference whatever to succession in respect of objections to reservations - whereas the initial proposals of Sir Humphrey Waldock did deal with this point - and the reasons for this omission are not clear. 257/

2. Problems connected with the specific object of certain treaties or provisions

136. Because of their general nature, the main codification conventions neglect, quite legitimately, the particular problems deriving from the specific object and nature of certain categories of treaty. Nevertheless, these problems occur very frequently in certain areas, particularly in connection with constituent instruments of international organizations, treaties relating to human rights and, more generally, directly establishing individual rights and codification treaties themselves (or specific provisions of such treaties).

(a) Reservations to constituent instruments of international organizations

137. Although the 1969 and 1986 Conventions are not totally silent on this point, article 20, paragraph 3, is far from resolving all the problems which can and do arise:

> The concept of a constituent instrument is not unambiguous and it may be asked whether the rule set out in article 20, paragraph 3, applies to any normative provisions such instruments may include.
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> Does this rule include interpretative declarations and, if so, who determines their exact nature? 258/
>
> What body is competent to accept reservations of this kind?

256/ Marco G. Marcoff, Accession à l'indépendance et succession d'Etats aux traités multilatéraux, Editions universitaires, Fribourg, 1969, pp. 345-346.

257/ See P.-H. Imbert, op. cit. (footnote 209), pp. 318-322.

258/ See paras. 128-129 above.

What is the exact scope of such acceptance? In particular, are the other member States bound by it and thus prevented from objecting to the reservation? 259/

(b) Reservations to human rights treaties

138. Although it is extremely flexible, the general reservations regime is largely based on the idea of reciprocity, 260/ a concept difficult to transpose to the field of human rights or indeed to other fields. 261/ As they are intended to apply without discrimination to all human beings, treaties concluded in this field do not lend themselves to reservations and objections and, in particular, the objecting State cannot be released from its treaty obligations vis-à-vis citizens of the reserving State.

139. Thus, in its General Comment No. 24 (52) of 2 November 1994, the Human Rights Committee considered that "human rights treaties ... and the [International] Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place ..." and that "... the operation of the classic rules on reservations is [so] inadequate ...". 262/

140. More so than other treaties, human rights treaties include monitoring mechanisms and the question is whether these bodies are competent to assess the validity of reservations. The European Commission of Human Rights and the European Court of Human Rights have recognized their own competence in this area because of the "objective obligations" deriving from the Convention of Rome of 1950. 263/ Similarly, in its General Comment No. 24 (52), the

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259/ On all these points, see especially: P.-H. Imbert, op. cit. (footnote 209), pp. 120-134, and Maurice H. Mendelson, "Reservations to the Constitutions of International Organizations", British Year Book of International Law, 1971, pp. 131-171.

260/ See Judgment of 6 July 1957, Certain Norwegian Loans, I.C.J. Reports, 1957, p. 24.

261/ See P.-H. Imbert, op. cit. (footnote 209), pp. 250-260.

262/ Op. cit. (footnote 210), para. 17, p. 7. It has, however, been questioned whether these specific features justify a special legal regime for reservations to human rights treaties (see Markus G. Schmidt, "Reservations to United Nations Human Rights Treaties - The case of the two Covenants", 20 typewritten pages, to be published in 1995 by the British Institute of International and Comparative Law; see also the comments of the British delegate at the CAHDI meeting on 21-22 March 1995, op. cit. (footnote 226), para. 31).

263/ See the above-mentioned report of the Commission in the Temeltasch case (footnote 246) (paras. 63-65) and, though less clearly, the judgements of the Court in the Belilos case (footnotes 210 and 247) (para. 50) and in the

Human Rights Committee considered that "It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant (...) in part because (...) it is an inappropriate task for States parties in relation to human rights treaties and in part because it is a task that the Committee cannot avoid in the performance of its functions". 264/

141. This gives rise to a third problem, namely, what effect does a reservation which has been declared invalid have on participation in a treaty by the reserving State? In the Belilos case, the European Court took the view that the reserving State remained, "without question", a party to the Convention. 265/

142. The specific nature of the problems raised by reservations to treaties relating to human rights and humanitarian questions is also clearly apparent in the provisions of the relevant treaties, which have often been subject to differing interpretations. There is an abundance of literature on this subject which it is impossible to comment on at this stage, but which will be of great value for the Commission's future work with regard both to the special problems of reservations to human rights treaties - a concept which is not in itself very precise - and to the legal regime of reservations. 266/

Weber case (footnotes 210 and 247) (para. 37); and especially the very recent Loizidou judgement (footnote 210).

264/ See footnote 210.

265/ Ibid. For the results of the case, see Jean-François Flauss, "Le contentieux de la validité des réserves à la Convention européenne des droits de l'homme devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6, par. 1" and "Revue universelle des droits de l'homme, 1993, p. 197. See also the Loizidou judgement and the report of the European Commission of Human Rights of 4 March 1991 in the Chrysostomos et al. v. Turkey case (footnote 210 above).

266/ See, especially: Samuel K.N. Blay and B. Martin Tsamenyi, "Reservations and Declarations under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees", International Journal of Refugee Law, 1990, pp. 527-561; Angela Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in Les clauses facultatives de la Convention européenne des droits de l'homme, Levante, Bari, 1974, pp. 301-319; Antonio Cassese, "A new reservations clause (art. 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)", Recueil d'études de droit international en hommage à Paul Guggenheim, Geneva, Institut Universitaire des Hautes Etudes Internationales, 1968, pp. 266-304 (see also Rivista di diritto internazionale, 1967, pp. 584-631); and "Su alcune 'riserve' alla Convenzione sui diritti politici della donna", 1968, pp. 294-314; Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination against Women", American Journal of International Law, 1991, pp. 281-321; Massimo Colcia, "Reservations to Multilateral Treaties on Human Rights", California Western International Law Journal, Winter 1985,

(c) Reservations to provisions codifying customary rules

143. Curiously, the 1969 and 1986 Conventions do not deal with the question of reservations to codification conventions or, to be more precise, codification clauses.

144. Opposing arguments can be put forward on this question. A reservation definitely cannot have any effect on States not parties to the codification treaty in respect of which the reserving State remains bound by the customary rule. This applies even more so to the signatory States to the treaty and this is generally the interpretation placed on the Judgment of the International Court of Justice of 20 February 1969 in the North Sea Continental Shelf cases. 267/ However, it has been pointed out that this rule, which would be an additional criterion for the non-validity of reservations under article 19, is debatable with regard to the intention of

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pp. 1-51; Alberto Colella, "Les réserves à la Convention de Genève (28 juillet 1951) et au Protocole de New York (31 janvier 1967) sur le statut des réfugiés", Annuaire français de droit international, 1989, pp. 446-475; Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", Virginia Journal of International Law, 1990, vol. 30, No. 3, pp. 643-719; J.A. Frowein, "Reservations to the European Convention on Human Rights", Mélanges Wiarda, Carl Heyman, Köln, 1988, pp. 193-200; Pierre-Henri Imbert, "La question des réserves et les conventions en matière de droits de l'homme", Actes du cinquième colloque international sur la Convention européenne des droits de l'homme (Frankfurt, 9-12 April 1980), Pédone, Paris, 1982, pp. 97-139; "Reservations and Human Rights Conventions", The Human Rights Review, Spring 1981, pp. 28-60; R. St. J. Macdonald, "Reservations Under the European Convention on Human Rights", Revue belge de droit international, 1988, pp. 438-450; S. Marcus-Helmon, "L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme", Mélanges Mosler, 1983, pp. 935-947; Claude Pilloud, "Les réserves aux Conventions de Genève de 1949", Revue internationale de la Croix Rouge, 1957, pp. 409-437; 1965, pp. 315-324; 1976, pp. 131-149 and 195-221; Isidore Ruiz Moreno, "Reservations to Treaties Relating to Human Rights", International Law Association, Report of the 54th Conference, The Hague, 1970, pp. 642-645 (debate, pp. 596-625; resolution, p. XIV); William A. Schabas, op. cit., footnote 217; M.G. Schmidt, op. cit. (footnote 262); Dinah Shelton, "State Practice on Reservations to Human Rights Treaties", Annuaire canadien des droits de la personne, 1983, pp. 206-234. See also the comments referred to above in footnotes 246, 247 and 248.

267/ I.C.J. Reports, 1969, pp. 38-39, para. 63.

the parties to the Convention 268/ and creates a regrettable confusion between jus cogens and jus dispositivum. 269/

3. Problems arising from certain specific treaty approaches

145. Because they were required to confine themselves to a very general level, the drafters of the Vienna Convention could not take account of certain specific treaty approaches, some of which developed rapidly from 1969 onwards. Two examples will suffice.

(a) Reservations and additional protocols

146. When an additional protocol supplements an existing convention, one of these instruments may contain a reservation clause and the other not, or they may both contain such clauses but the clauses may be incompatible. The situation is relatively rare, but does occur, 270/ raising extremely tricky problems. 271/ In addition, when ratifying a protocol (or accepting an optional clause), a State may be tempted to formulate a belated reservation to the basic treaty. 272/

(b) Reservations and the bilateralization approach

147. This approach, frequently taken in conventions relating to private international law, enables States parties to choose their partners and even to establish exceptional arrangements with them. Although used somewhat warily in the past (see art. XXXV, para. 1, 1947 General Agreement on Tariffs and

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268/ See P. Reuter, op. cit. (footnote 197), p. 82.

269/ On this difficult problem, see especially G. Teboul, "Remarques sur les réserves aux conventions de codification", in Revue générale de droit international public, 1982, pp. 679-717. See also General Comment No. 24 (52) of the Human Rights Committee (footnote 210), para. 8, p. 3, and W.A. Schabas, op. cit. (footnote 217), pp. 15-26.

270/ See the 1951 Convention relating to the Status of Refugees, art. 42, para. 1 (United Nations, Treaty Series, vol. 189, No. 2545, p. 137) and the 1967 Protocol, art. VII (ibid., vol. 976, No. 14151, p. 3), as well as the 1961 Single Convention on Narcotic Drugs (ibid., vol. 520, No. 7515, p. 151) and the 1972 Protocol (ibid., vol. 976, No. 14151, p. 3).

271/ See P.-H. Imbert, op. cit. (footnote 209), pp. 213-214, and A. Colella, op. cit. (footnote 266), pp. 451-452.

272/ See G. Cohen-Jonathan, op. cit. (footnote 248), pp. 311-313; Gérard Cohen-Jonathan and Jean-Paul Jacqué, "Activités de la Commission européenne des droits de l'homme", Annuaire français de droit international, 1991, pp. 562-565; and Claudio Zanghi, "La déclaration de la Turquie relative à l'article 25 de la Convention européenne des droits de l'homme", Revue générale de droit international public, 1989, pp. 69-95.

Trade), 273/ the system spread rapidly in the 1970s in particular: see articles 21 and 23 of the Hague Convention on the Recognition and Execution of Foreign Judgements in Civil and Commercial Matters of 1 February 1971 274/ and article 34 of the Convention on the Limitation Period in the International Sale of Goods of 14 June 1971. 275/ This flexible approach emerged as a "rival" to the reservations approach, but it also raises specific problems concerning the reservations stricto sensu which can be formulated concerning these conventions. 276/

(c) Conclusion

148. The above remarks do not call for any particular conclusions at this stage. Their purpose was not to outline solutions to the problems posed by the gaps in the 1969, 1978 or 1986 Vienna Conventions, but simply to note that such problems exist. Although the list is undoubtedly far from exhaustive and they are of varying difficulty and importance, the main problems noted above are the following:

(i) Is it legitimate to speak of reservations to a bilateral treaty?

(ii) If so, are those reservations subject to a special legal regime?

(iii) In what respect(s) does an "interpretative declaration" differ from a reservation?

(iv) Is an "interpretative declaration" which in fact corresponds to the definition of reservations subject to the legal rules applicable to reservations?

(v) What are the legal effects of a "genuine" interpretative declaration?

(vi) And, more generally, to what legal regime are such declarations subject?

(vii) Does the formulation of a reservation to a treaty that has not yet entered into force have an effect on that entry into force when the treaty makes such entry into force conditional on an expression of

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273/ United Nations, Treaty Series, vol. 55, No. 814, p. 188.

274/ Hague Conference on Private International Law, Collection of Conventions (1951-1988), No. XVI, p. 107.

275/ A/CONF.63/15.

276/ On this question, see P.-H. Imbert, op. cit. (footnote 209), pp. 199-201; and, in particular, Ferenc Majoros, "Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", Journal du droit international, 1974, pp. 73-109.

consent to be bound by its provisions on the part of a minimum number of States or international organizations?

(viii) What legal regime is applicable to reservations when a succession of States takes the form of the creation of a newly independent State formed from two or more territories or in the case of unification of States?

(ix) May contracting States formulate an objection to the maintenance of a reservation of the predecessor State by the successor State, inter alia, when the reservation appears to them to be incompatible with a new reservation introduced by the successor State?

(x) What is/are the legal regime or regimes applicable to objections to reservations in the context of a succession of States, irrespective of the form it takes?

(xi) Should the specific object of certain treaties or treaty provisions lead to a change in the rules applicable to the formulation and to the effects of reservations and objections?

(xii) What rules, other than the very general indications given in article 20, paragraph 3, are applicable to reservations to constituent instruments of international organizations? 277/

(xiii) Are the rules on reservations appropriate for international human rights instruments?

(xiv) If not, how should they be adjusted in order to take account of the specific characteristics of such instruments?

(xv) Is a reservation to a provision codifying a customary rule of international law admissible?

(xvi) If so, what would be the effects of such a reservation?

(xvii) If not, how is one to distinguish a reservation to a codifying rule from a reservation to a peremptory rule of general international law?

149. To this already long, though incomplete, list of questions not covered by the Vienna Conventions can be added others relating to the existence of what one might call "rival" institutions of reservations aimed at modifying participation in treaties, but, like them, putting at risk the universality of the conventions in question (additional protocols; bilateralization; selective acceptance of certain provisions, etc.).

277/ See, in this connection, the more specific questions raised in para. 137.

CHAPTER III

THE SCOPE AND FORM OF THE COMMISSION'S FUTURE WORK

150. The topic dealt with in this preliminary report is entitled "The law and practice relating to reservations to treaties". As the Special Rapporteur indicated in the outline prepared in 1993, 278/ this title seems rather academic. Moreover, the wording suggests that there might be some opposition between "the law" on the one hand and "practice" on the other. It is true that some practices do not, prima facie, seem readily compatible with the rules set forth in the three relevant Vienna Conventions, 279/ but to oppose the law and practice in this way would be inappropriate; the latter enriches and develops the former and, in the same way as treaty provisions, forms part of the "legal landscape" whose contours the Commission is called upon to draw in every detail; and one of the great merits of the "Vienna rules" relating to reservations is their flexibility, which offers the advantage of allowing the law to adapt itself to the requirements of States and international organizations. 280/

151. For these various reasons, the Commission may deem it reasonable to choose a title that is as neutral and comprehensive as possible and does not prejudge the results of its work and to propose an amendment along those lines to the General Assembly on the understanding that the title may be changed or made more specific at a later stage if it should appear advisable to limit the scope of the topic. The title might be: "Reservations to treaties".

152. In any event, it is in this spirit of neutrality and out of a concern not to prejudge either the form or the contents of the Commission's work that the present preliminary report was drafted and the methodological suggestions set out below formulated. These relate, successively, to the problems arising from the existence of earlier instruments which partially regulate the issue and the achievements of which ought to be preserved and to the form which the Commission's work on the topic might take.

Section 1. Preserving what has been achieved

153. There is no doubt that the provisions on reservations to be found in the 1969 Vienna Convention on the Law of Treaties did not, at the time of their adoption, constitute an exercise in mere codification. They were then far more a matter of the progressive development of international law and completed the development that started with pan-American practice even before the Second World War, continued with the Advisory Opinion of the International

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278/ See footnote 5 above.

279/ See para. 160 below.

280/ See para. 166 below.

Court of Justice of 18 May 1951 281/ and was consolidated by the change made in 1962 by Sir Humphrey Waldock's first report 282/ and accepted by a majority of the Commission's members.

154. It may be considered, however, that, with the passage of time, the question whether the rules relating to reservations laid down in the 1969 Convention are an aspect of codification or of progressive development has become largely obsolete. On the one hand, the Convention consolidated or "crystallized" earlier trends that were already well under way. 283/ Moreover and more especially in the 26 years "that have elapsed since the Vienna Convention was opened for signature, the rules regarding reservations stated in that treaty have come to be seen as basically wise and to have introduced desirable certainty". 284/

155. This consolidation, which is partial, 285/ is the result of several factors, especially:

(i) The rules reflected the conditions of international society at the time they were adopted;

(ii) They were part of a general tendency to make multilateral conventions more flexible and more open;

(iii) They were, moreover, adopted almost unanimously at the Vienna Conference;

(iv) And they were included in the 1986 Convention. 286/

156. These considerations have also led States to respect these provisions in the main, whether or not they have ratified the Convention 287/ and even

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281/ I.C.J. Reports 1951, p. 15.

282/ See paras. 15 et seq. below.

283/ See, for example, R.R. Baxter, "Treaties and Customs", Recueil des cours de l'Académie de droit international de la Haye 1979 - I, vol. 129, p. 48.

284/ R.W. Edwards Jr., op. cit. (footnote 240), p. 365.

285/ See paras. 160-161 above.

286/ See paras. 88 and 90 above.

287/ See, for example, in the case of the United Kingdom, the statements of Sir Ian Sinclair in American Society of International Law - Proceedings of the 78th Annual Meeting (1984), pp. 273 and 274, and, in the case of the United States, those of Robert E. Dalton, ibid., p. 278. The Third Restatement of Foreign Relations Law of the United States (American Law

if, like France, they have not signed it. Although disputes in this area have been fewer in number than the uncertainties of the law might suggest, the arbitrators or judges who have had to deal with them often refer, expressly or by implication, to the provisions of the Convention 288/ and it is interesting to note that, even the Human Rights Committee, which rejects the validity of the solutions adopted in 1969 with regard to instruments relating to human rights, 289/ takes these provisions as the starting point and seems to think that they represent general international law in this field. 290/

157. It may thus be said that, even if the Vienna Convention was an exercise in progressive development with regard to reservations, the rules established by article 2, paragraph 1 (d), and articles 19 to 23 have now acquired customary force.

158. This conclusion can, however, be maintained only subject to verification.

159. The wording of the decisions on which it is based in part is not without ambiguity. For example:

> In the Mer d'Iroise case, the Court of Arbitration refers to the definition of a reservation contained in article 2, paragraph 1 (d), of the 1969 Convention, pointing out that it is accepted by both parties (para. 55), and seems rather to be making a correlation between the rules of general international law and those laid down in article 21, paragraph 3, of the Convention than to be taking a general position on the value of the Convention as codification (see para. 61); 291/ and,
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> In the Temeltasch case, the European Commission of Human Rights considers that the Convention "primarily lays down rules that exist in customary law and is essentially in the nature of a codification". 292/

Institute, Saint-Paul, 1987) essentially reiterates the rules of the 1969 Convention with some additional details designed to meet the requirements of the domestic practice of the United States. See in this connection (with regard to the Second Restatement), C. Logan Piper, op. cit. footnote 244, p. 317.

288/ See, in particular, the case law referred to above (footnotes 245-248) and the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock to the judgement of the ICJ of 20 December 1974 in the Nuclear Tests case, I.C.J. Reports 1974, p. 349.

289/ See para. 139 above.

290/ General comment No. 24 (footnote 210 above), para. 17, p. 7.

291/ Award referred to above (footnote 245).

292/ Report referred to above (footnote 246), emphasis added.

160. In addition, State practice, or the practice of some States, and even that of international organizations as depositaries, sometimes contradicts the very terms of the 1969 Convention. Thus, in a very detailed study, Professor Giorgio Gaja examines successively, giving examples, the practices relating to:

> Reservations subsequent to ratification 293/ (contrary to the provisions of art. 2, para. 1 (d), and art. 19 of the Convention);
>
> The disregard States have shown for the provisions of article 19 concerning reservations, 294/ although it is true that the wording of this provision is ambiguous; 295/
>
> The non-observance of the suspensive condition represented by the one-year time period before a State can become a party to the Convention, as provided for in article 20, paragraph 5; 296/
>
> The effect of objections to reservations, 297/ although, here again, the provisions of article 20, paragraph 4, seem particularly ambiguous. 298/

Reference may also be made, and this is only one example among many, to the position of the Secretary-General of the United Nations regarding the time period in which States may raise objections to reservations: "The Secretary-General does not believe that he has any authority, in the absence of new instructions from the General Assembly, to adjust his practice to Vienna Convention rules which would be contrary to his present instructions". 299/

161. In any event, the Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its

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293/ Op. cit. (footnote 209), pp. 310-313.

294/ Ibid., pp. 313-320.

295/ See paras. 108 et seq. above.

296/ G. Gaja, op. cit. (footnote 209), pp. 320-324.

297/ Ibid., pp. 324-329.

298/ See paras. 117 et seq. above.

299/ United Nations Juridical Yearbook, 1975, p. 204. See also United Nations ... 1981, p. 150.

preparation, 300/ the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time. As one author has written, "Calm has been introduced by the Vienna Convention on the Law of Treaties (...). However, the Vienna Convention - perhaps the most successful international effort at codification ever undertaken - has not frozen the law. Rather, the rules in the Convention structure its future development". 301/

162. Truth to tell, there is but one clear conclusion that can be drawn from the foregoing considerations: the Vienna Convention is, at one and the same time, the culminating point of a development which began long ago and which consists in facilitating participation in multilateral conventions to the maximum extent while preserving their purpose and their object and the starting point of a multifaceted and not always consistent practice, which, on the whole, seems to be much more the result of considerations of political expediency based on a case-by-case approach than of firm legal beliefs.

163. The Commission is therefore faced with a choice: either it can go back to the drawing board with the rules adopted in 1969 - and confirmed in 1986 - and in 1978, so that, at one go, the ambiguities can be removed, the gaps filled, and they can be given the consistency they sometimes seem to lack, or it can take it that the treaty rules are well established and simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility.

164. There are, undoubtedly, very good arguments in favour of the first limb of that alternative, for instance:

> There are considerations of a political nature which, to a large extent, lay at the origin of the - often carefully contrived - ambiguities in the provisions relating to reservations in the 1969, 1986 302/ and perhaps even the 1978 Conventions; but such obstacles to a more consistent approach have no longer obtained since the completion of political decolonization stricto sensu and the end of the cold war in particular;
>
> Some of the difficulties encountered derive from the incompatibility that exists, according to some analysts at least, between the various provisions of the 1969 and 1986 Conventions (for example, between art. 19 (c) and art. 20, para. 4, or art. 21, para. (3)); it will be possible to overcome these only if their wording is amended;

300/ See chapter II above.

301/ R.W. Edwards Jr., op. cit. (footnote 240), p. 405.

302/ See paras. 61, 90 and 96 above.

> Even if these rules have acquired customary force, there is nothing to prevent them from being amended; and that is desirable, for some provisions, though clear, are open to criticism. 303/

165. Notwithstanding the weight of these arguments, the Special Rapporteur is very much attracted by the second approach referred to above, 304/ which preserves what has been achieved by existing provisions. Admittedly, such a choice is not without its drawbacks; in particular, the Commission will have to bear with any inconsistencies in the existing provisions and must not attempt to find an "ideal solution". But, as the International Law Commission noted as far back as 1951, "no single rule uniformly applied can be wholly satisfactory", 305/ so that the search for such a solution would inevitably result in a dispersal of rules that would probably be the source of major complications.

166. On the other hand, what should be termed a "modest approach" 306/ certainly offers great advantages:

> Amendment of the existing provisions would run into considerable technical difficulty: a State party to one of the existing conventions in force, or that might become a party, might very well refuse to accept such amendments as would be adopted; 307/ the result would be a dual legal regime of reservations that would be the source of very great difficulty under international law, at the present stage of its development, there is no means of imposing harmonization of the rules in force;
>
> The view may be taken that the present ambiguities, which are obvious, can be removed if the existing rules are clarified and that they are due not so much to their inconsistency as to their excessive brevity. Consequently, if the Commission could undertake the task of clarifying the existing provisions, that would at least make it possible to overcome most of the difficulties;

303/ For instance, the presumption of the applicability of the treaty between the reserving State and the objecting State, as laid down in article 21, paragraph 3, of the 1969 and 1986 Conventions and adopted almost by surprise at the 1968-1969 Conference, is the subject of much lively criticism.

304/ See para. 163.

305/ See para. 20 above.

306/ But this certainly does not mean that it is the easy way out, as the Commission will have to try to find a variety of solutions, compatible with the present provisions.

307/ Either as formal amendments or in an additional protocol.

In their statements in the Sixth Committee in 1993 and 1994, the representatives of States, while endorsing the inclusion of the topic of reservations in the Commission's agenda, 308/ expressed their support for the existing provisions; 309/ above all, whatever their defects, the rules adopted in 1969 have proved their worth in that, on the one hand, they comply with the objective of flexibility which seems to have the support of States as a whole and, on the other, although their application gives rise to some difficulties, it has never degenerated into a serious dispute and, although, from the standpoint of principle, the protagonists have in some cases remained on opposite sides, they have always been reconciled in practice.

167. One study often quoted shows that the adoption of the 1969 Vienna Convention has not led to an increase in the formulations of reservations and also that, on the whole, those that were formulated concerned relatively minor points. 310/ However, it must be noted that this study was published in 1980 and that it is evident from the statistics it gives that a number of reservations and objections analysed are what might be termed "cold war" reservations and objections, since a significant proportion of the reservations were made by central and eastern European States and based on ideological grounds - refusing settlement of disputes clauses, for instance - and those grounds in many cases also explain the objections of the "Western" countries. One may therefore think that the new diplomatic deal helps to de-dramatize still further the problem of reservations. In a more limited context, this also seems to be confirmed by a recent study of Markus Schmidt on reservations to the two 1966 International Covenants on Human Rights, which concludes that "[c]ontrary to what the large number of reservations to the Covenants might suggest, (...) they do not represent a massive deviation from the obligations of States parties". 311/

168. Accordingly and regardless of their deficiencies, the provisions already adopted on reservations, which have at least served as a guide to practice, have proved their usefulness and have certainly not made matters worse in that regard. Subject to the reactions of the Sixth Committee, whose special attention it would perhaps be advisable to draw to that point, the Commission would probably be well advised to decide to confine its task to filling the gaps and to removing the ambiguities in the existing rules, but without embarking on their amendment.

169. The Commission should none the less be aware that, by adopting that approach, it would be prevented from proposing amendments to the 1969, 1978

308/ See para. 4 above.

309/ The above mentioned CAHDI discussion (para. 114 (iv)) in March 1995 also seems to reflect a majority view to that effect.

310/ J.K. Gamble, op. cit. (footnote 244), pp. 372-394 passim; see also Ian Sinclair, op. cit. (footnote 12), p. 77.

311/ Op. cit. (footnote 262).

and 1986 Conventions. That could have drawbacks in the case of certain categories of treaties and, in particular, of the international legal human rights instruments of which the Human Rights Committee recently stated that "the operation of the classic rules on reservations is so inadequate". 312/ However, apart from the fact that this view, which is not unanimously shared, 313/ calls for closer examination, it is not impossible to conceive of solutions. It should be borne in mind, in particular, that the rules on reservations which appear in the 1969 and 1986 Conventions are of a residual nature only; States can derogate from them in the "substantive" conventions they conclude. In the circumstances, the Commission would be entirely free to suggest model clauses adapted to special categories of multilateral treaties and, in particular, to human rights treaties. That suggestion leads to a question as to the forms that the results of the Commission's work on the topic of reservations to treaties might take.

Section 2. The form that the results of the Commission's work might take

170. Under the terms of article 1, paragraph 1, of its Statute:

> "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification".

But there are many ways of performing that function and, while the Statute speaks of "drafts" with regard both to progressive development and to codification, 314/ it imposes no particular form on them.

171. It is true that, in respect of progressive development, article 15 of the Statute seems to assign the Commission the task of drafting conventions, but, in fact, the dividing line between codification and progressive development has never been clear cut and, in view of the uncertainties of practice on at least some aspects of the draft under consideration, it would definitely be impossible to establish such a line in the present case. It has happened in the past, moreover, that, in carrying out certain tasks, the Commission has not prepared a proper set of draft articles; this was the case, in particular, as far back as the question of "reservations to multilateral conventions", which, in 1951, was dealt with in a chapter of the Commission's report to the General Assembly ending with "conclusions" in which the Commission suggested the practice to be adopted "with regard to reservations to multilateral conventions, especially those of which the Secretary-General of the

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312/ See para. 139 above.

313/ See footnote 262 above.

314/ See, in particular, arts. 16, 21 and 22.

United Nations is the depositary", but those suggestions were not submitted formally as a set of draft articles with commentaries. 315/

172. In its resolution 48/31 of 9 December 1993, 316/ the General Assembly left in abeyance the question of the form to be given to the Commission's work on the topic pending the submission of a preliminary study. The Commission will therefore probably have to send the General Assembly some recommendations on the matter following its discussion of the preliminary report.

173. In any event, many options seem to be available and resolution 48/31 has not ruled out any given solution. Here again, the Commission has to make a choice.

174. It should also be noted that its decision on the final form of its work is quite independent of the decision it will take on the content of that work. 317/ Or, rather, while it is obvious that, if the Commission proposes amendments to existing conventions, its recommendations should take the form of a draft convention, a decision to "preserve what has been achieved" will leave the issue of form entirely open.

175. Under this approach, the one preferred by the Special Rapporteur, 318/ one possibility would be to prepare draft protocols to existing conventions, it being understood that the conventions are not to be amended, but, rather, that the provisions adopted in 1969, 1986 and 1978 are to be supplemented and refined. Then, theoretically, the above-mentioned complications, 319/ which would be the result of the co-existence of incompatible rules in force between two groups of States, would no longer arise. States that ratified the protocol or protocols would simply be bound by clearer and more detailed rules than those that were parties only to the "basic" conventions.

176. Another way of achieving the same result would be to formulate a set of consolidated draft articles on reservations to treaties by combining, in a single text, provisions scattered throughout the three relevant Vienna Conventions and new rules intended to refine and supplement them. It would then be up to the General Assembly to determine the fate of that draft. However, even if it was to become a "convention on the law of reservations to treaties", it would theoretically not conflict with existing conventions, since it would merely reproduce their provisions word for word.

177. There is one fairly strong argument in favour of choosing one of these two solutions: it is precisely that these treaty rules exist and it might

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315/ These "conclusions" are reproduced in full in para. 20 above.

316/ See para. 5 above.

317/ See para. 163 above.

318/ See paras. 165-168 above.

319/ See para. 166.

seem appropriate to continue along the same lines and consolidate the treaty regime for reservations.

178. As indicated above, 320/ however, the Commission is by no means bound to prepare a proper set of draft articles in the form either of a draft protocol or of a "consolidated" convention. It can just as easily opt for only a detailed study of the problems involved or even an article-by-article commentary on existing provisions, a sort of "guide to the practice of States and international organizations" on reservations. Such a document would carry the weight of a text formally endorsed by the Commission and might subsequently be the subject of a recommendation by the General Assembly. This approach also offers a number of advantages. More easily than a formal set of articles, it would allow the specific features of certain types of treaties to be taken fully into consideration, especially as the Commission would simultaneously be adopting model clauses for various situations. 321/

179. Even if the Commission leans towards the more classical solutions of one or more sets of draft articles, 322/ there is nothing to stop it from recommending the inclusion of any model clauses it might adopt in future multilateral conventions on specific topics for which the application of general rules would seem inappropriate.

Conclusion

180. The provisions of the 1969, 1978 and 1986 Vienna Conventions relating to reservations certainly have their weaknesses, but they also offer the great advantage of flexibility and adaptability. In the Special Rapporteur's view, it would be regrettable to go back on solutions that have proven their worth in order to take up instead an abstract line of thinking and to search for an ideal solution that probably does not exist.

181. On the other hand, and herein lies the crux of the issue, it would certainly be advantageous to fill the gaps in existing texts and, in so far as possible, to do away with their ambiguities. Yet that endeavour, which is useful and salutary in many respects, must be carried out prudently and with due regard for the flexibility that facilitates the broadest possible participation in multilateral conventions, while simultaneously safeguarding their basic objectives.

182. There are several ways of achieving this goal - draft articles additional to existing treaties, "consolidated" draft articles, a "guide to practice", model clauses or a combination of these approaches. It is up to the Commission, in close consultation with the Sixth Committee, to determine which are the most appropriate.

320/ Paras. 170-174.

321/ These clauses might derogate from existing law, since they would be intended for inclusion in specific treaties, but they would not call in question the provisions of existing treaties. See para. 169 above.

322/ See paras. 175 and 177 above.